86-1444

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1986

MICHAEL BIGLEY, GENE AMICARELLI
and SALEEM AZAD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 6, 1987

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25 pp

QUESTIONS PRESENTED

On November 30, 1984, Petitioners and eight (8) other persons were charged in a multi-count indictment with the offense of mail fraud contrary to Title 18 United States Code Section 1341. Petitioners Bigley and Amicarelli are chiropractors. Petitioner Azad is an allopathic physician specializing in radiology. Each Petitioner was associated with a medical/chiropractic clinic located in Highland Park, Michigan. There were 155 counts in the indictment and the essence of the charge was that all Defendants were associated with the clinic which engaged in the practice of administering unnecessary medical tests which were billed to Blue Cross/Blue Shield of Michigan. Petitioners Amicarelli and Bigley were charged only in Counts 118 through 155. Petitioner Azad was charged in all counts.

Petitioners Bigley and Amicarelli had been subpoenaed to appear before the grand jury to provide testimony on April 4, 1984 and April 5, 1984. They appeared and testified without an attorney. At the time they were both engaged in the practice of chiropractic in Orlando, Florida. Subsequent to indictment Petitioner Amicarelli's counsel was provided a copy of his grand jury testimony. Attached to it, apparently through inadvertence, were nine (9) pages of grand jury commentary including statements by the Assistant United States Attorney. This inadvertent disclosure caused Petitioners to file a Motion to Dismiss the Indictment for Grand Jury Impropriety and Motion for Disclosure Relating to Grand Jury Proceedings. Each motion was denied by the District Court.

These facts raise these questions:

I.

DID COMMENTS BY AN ASSISTANT UNITED STATES ATTORNEY BEFORE THE GRAND JURY IMPINGE UPON PETITIONERS' CONSTITUTIONAL RIGHT TO AN UNBIASED, INDEPENDENT AND PROPERLY INFORMED GRAND JURY?

II.

DID THE AFOREMENTIONED COMMENTS CONSTITUTE GROUNDS FOR DISCLOSURE OF MATTERS OCCURRING BEFORE THE GRAND JURY PURSUANT TO RULE 6(C)(ii), FEDERAL RULES OF CRIMINAL PROCEDURE?

LIST OF PARTIES

The parties to this proceeding in the United States Court of Appeals for the Sixth Circuit were as follows:

1. Michael Bigley, Defendant-Appellant.
2. Gene Amicarelli, Defendant-Appellant.
3. Saleem Azad, Defendant-Appellant.
4. United States of America, Plaintiff-Appellee.

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OPINIONS BELOW

The Per Curiam opinion of the Court of Appeals was filed on December 5, 1986. It is reproduced in the Appendix to this Petition at pp. A-1 – A-10. The opinion was not recommended for publication. However, the government filed a formal motion to publish the opinion in part, because of the frequency in which grand jury abuse issues are raised in the Eastern District of Michigan. The government's motion is reproduced in the Appendix at pp. A-i1 – A-12. On January 8, 1987 the Court of Appeals granted the government's motion.

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on January 19, 1987. The Court of Appeals' order is reproduced in the Appendix at p. A-13.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1986. Petitioners' request for a rehearing and suggestion for rehearing en banc was denied on January 19, 1987. This Petition has been filed within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FEDERAL RULE OF CRIMINAL PROCEDURE

Rule 6(e)(2), Federal Rules of Criminal Procedure provides:

> "A grand juror, an interpreter, a stenographer, an operator of a recording devise, a typist who transcribes recorded testimony, an attorney for

> the government, or any person to whom disclosure is made under Paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court."

Rule 6(e)(3)(C)(ii) provides:

> "Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
>
> "(ii) When permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

STATEMENT OF THE CASE

On November 30, 1984, Petitioners and eight (8) other persons were charged in a multi-count indictment with the offense of mail fraud contrary to Title 18 United States Code Section 1341. The indictment is reproduced in the Appendix at pp. A-14–A-28. Petitioners filed a Motion to Dismiss the Indictment for Grand Jury Impropriety and Motion for Disclosure Relating to Grand Jury Proceedings. The United States District Court denied the motions. Petitioners began a lengthy jury trial and after several weeks entered conditional guilty pleas pursuant to Rule 11(a)(2), Federal Rules of Criminal Procedure allowing them to preserve their right to challenge the previously described pretrial rulings. Petitioner Amicarelli plead guilty to a single count. Petitioners Azad and Bigley

each plead guilty to two counts. All other counts were dismissed and the maximum terms of possible imprisonment were limited to one year, sixteen months and eighteen months respectively.

Petitioners appealed to the Sixth Circuit Court of Appeals. Their appeal and Petition for Rehearing were denied.

REASONS FOR GRANTING THE WRIT

I.

IMPROPER PROSECUTORIAL COMMENT BEFORE THE GRAND JURY WHICH IMPLICATES THE CONSTITUTIONAL REQUIREMENT THAT A GRAND JURY MUST ACT IN AN UNBIASED, INDEPENDENT AND INFORMED MANNER REQUIRES THE ACTIVE SUPERVISION OF THIS COURT IN ORDER TO PRESERVE THE INTEGRITY OF THE GRAND JURY PROCESS AND PREVENT DIVERSION OF THE GRAND JURY FROM ITS CHERISHED AND HISTORICAL ROLE AS A "PROTECTIVE BULWARK BETWEEN THE ORDINARY CITIZEN AND THE OVER ZEALOUS PROSECUTOR".

In *United States* v *Dionisio*, 410 U.S. 1, 17 (1973), this Court noted that the grand jury's historical role is that of a "protective bulwark between the ordinary citizen and the over zealous prosecutor . . ." In *Wood* v *Georgia*, 370 U.S. 375, 390 (1962), Mr. Chief Justice Warren, writing the opinion for the Court, described the function of a grand jury with respect to its protection of the rights of citizens, in stronger terms, stating:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing

> between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

The Fifth Amendment therefore requires that a grand jury act in an informed, independent and unbiased manner. These critical tasks, however, cannot be achieved in the absence of unbiased prosecuting officials whose concern for justice transcends all considerations other than those devoted to the sanctity of the grand jury process. The importance of the grand jury function, as well as the "gain in prosecutor's influence over grand juries", requires the courts to strictly scrutinize a prosecutor's conduct in obtaining an indictment. See e.g. *United States* v *Hogan*, 712 F2d 757, 759 (2d Cir. 1983). Moreover, where a prosecutor departs from normal practices and governing principles of the law intended to protect all citizens before a grand jury, dismissal may lie for prosecutorial misconduct, based upon the supervisory power of the courts. *United States* v *Estepa*, 471 F2d 1132 (2d Cir. 1972); *United States* v *Jacobs*, 547 F2d 772, 778 (2d Cir. 1976), cert denied, 437 U.S. 31 (1978).

The American Bar Association Standards Relating to the Prosecution Function, in particular Standard 3.5(b) as to Grand Juries, admonishes that a prosecutor should give due deference to the grand jury's status as an independent legal body. A prosecutor should not make statements or arguments in an effort to influence the grand jury in a manner that would be inadmissible at trial before a petit jury. The Standards recognize that a federal prosecutor's power to influence a grand jury is great. As a representative of the United States Government, a prosecutor possesses potent credibility. Therefore, when he or she speaks, it must be with the care

that befits the position and duties of the United States Attorney who holds a special trust.

Neither this Court's decision in *Costello* v *United States*, 350 U.S. 359 (1956) nor any other decision by this Court invalidate the above articulated principles as they apply to the grand jury. However, the Sixth Circuit Court of Appeals has, as demonstrated by this case, established an intolerable standard which is inconsistent with these principles and serves no purpose other than to weaken the bedrock of this historic and constitutionally sanctioned body. This unfortunate circumstance evolves from earlier Sixth Circuit precedent. See *United States* v *Griffith*, 756 F2d 1244, 1249 (6th Cir.), cert denied, 106 SCt 114 (1985). What the Sixth Circuit refers to as a "strict standard" has obviously distorted perception of what type of prosecutorial behavior is appropriate.[1]

Prior to trial Petitioners, through inadvertence, received nine (9) pages of commentary during which the prosecutor was able to generate a host of severely prejudicial and improper remarks. Sadly, these included comments wherein the prosecutor:

1. Gave unsworn testimony to the grand jurors which purported to summarize the testimony of a prospective expert witness (Dr. Nelson) who was not called to testify and who, in fact, was not an expert.

2. Made highly perjorative and derogatory unsworn statements that Petitioners were guilty of the alleged offense under investigation.

3. Made inflammatory and prejudicial unfounded comments speculating that Petitioners Bigley and Amicarelli were currently engaged in criminal acti-

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[1] Slip Opinion at page A-4.

vity in the State of Florida at the time of their appearance and testimony.

4. Made improper statements and arguments in an effort to influence the judgment of the grand jury.

5. Injected personal opinions of the credibility of Petitioners Bigley and Amicarelli and another witness who was later indicted.

Regrettably, the Court of Appeals chose to characterize the offending remarks benignly as a "summary" of expected testimony. Slip opinion at page A-5. The prosecutor's "summary" of Dr. Nelson's "statements" and unnamed others was, however, grossly inaccurate and totally inconsistent with actual trial testimony.[2]

At trial it was revealed that Dr. Nelson did not even work at the Hamilton Clinic at the time period involved in the indictment. He only possessed a limited license and did not even receive a full license to practice chiropractic in Michigan until a year and three months after he left clinic employment. In fact, he was not an expert and the government actually objected to defense counsel's efforts to qualify him as such at trial.

The Court of Appeals also overlooked the fact that Dr. Nelson's trial testimony and opinion was considerably less prejudicial than the inaccurate summary provided to the grand jury by the prosecutor. Dr. Nelson actually gave testimony concerning an element of legitimacy at the clinic by indicating that most of his patients were "repeat patients, patients who were coming in for maintenance care." Like Petitioners Amicarelli and Bigley, Dr. Nelson did neurological checks, and performed spinal adjustments all in the course of seeing an average of

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[2] Petitioner Amicarelli's grand jury testimony and the attending commentary are reproduced in the Appendix at pp. A-29 – A-59.

from thirty (30) to forty (40) patients per day. He did opine that the clinic was not run as professionally as he thought it should because not everyone wore white and he felt that everyone should wear white. Also, he felt that the office staff did not treat patients professionally and the clinic was not clean since everyone that came in was smoking and there were several cigarette burns in the carpet.

Further, the Court of Appeals overlooked the fact that in Michigan a chiropractor by law is not qualified to give opinions on the subject of medical necessity. See e.g. *Demido* v *Attorney General,* 100 Mich App 254 (1980). In short, the prosecutor's "summary" to the grand jury was damning; the actual testimony of Dr. Nelson was not. And Petitioners have always contended that no witness, expert or otherwise, actually appeared before the grand jury to give first hand evidence conforming to the prosecutor's "summary".[3] The prejudice to Petitioners is obvious since the subject matter of the investigation was complex and highly technical involving questions concerning the medical necessity of numerous and varying medical tests and procedures.

Moreover, Petitioners contend that the Court of Appeals' opinion has now transformed the word "summary" into a talisman which renders prejudicial prosecutorial comment innocuous. The utilization of such terms as "summary" by prosecutors to supplant real evidence is especially dangerous because it necessarily undermines grand jury independence and subjects the jury to manipulation. The Court of Appeals derided Petitioners' suggestion that the prosecutor's comments constituted

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[3] The government has never taken issue with Petitioners' assertion that Nelson never appeared before the grand jury since no Jencks material was disclosed.

unsworn testimony.[4] Thus, the Court of Appeals focused upon one portion of the prosecutor's comments and characterized it as "preview" of testimony. In so doing, however, the Court failed to recognize and appreciate that the overall tenor of the statements constituted assertions of fact. This could be made no more clear than when the prosecutor stated:

> "MR. SOISSON: For example, Dr. Nelson will tell you everybody got the same test. They were just routine. There were other people at the clinic that have been interviewed. They have indicated that it was just routine. Everybody got the same tests. *The record can indicate that everybody got the same tests."* p. A-55.

It seems unfair and inaccurate in Petitioners' view for the Court of Appeals to find that such comments do not constitute a form of testimony not under oath. Even the United States Department of Justice takes a contrary view. Thus, Justice Department publications repeatedly admonish federal prosecutors to avoid expressing personal opinions as to guilt, the strength of the evidence or credibility of witnesses. United States Department of Justice, Narcotic and Dangerous Drug Section Monograph "Federal Grand Jury Practice Manual" (1983) at 45.

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[4] It is incongruous that the Court of Appeals found the prosecutor's remarks to be appropriate yet the government actually cited *United States* v *Mechanik*, __ U.S. __ (1986), and argued harmless *error* as an alternative theory. In the government's view, Petitioners' conditional guilty pleas rendered harmless any prejudicial conduct impacting upon the grand jury's charging function. Of course, such an argument effectively abrogates Rule 11(a)(2), Federal Rules of Criminal Procedure. Since, however, the government was not forced to consent to these conditional pleas, any analysis purportedly dealing with "substantial social costs" has no application here. The government also misconstrues the narrow holding in *Mechanik* and inappropriately attempts to extend it beyond a technical violation of Rule 6 to a constitutional violation involving fundamental fairness and due process.

In discussing the axiom that a prosecutor cannot act as a witness before the grand jury, the "Federal Grand Jury Practice Manual", *supra*, observes that the prosecutor must:

> "Be extremely careful in responding to questions that he or she does not give evidence." Manual at 166.

Of course, a prosecutor may effectively give evidence either under the guise of lengthy leading questions or, as in this instance, under the guise of responses to grand jury questions. C.f. *United States* v *Samango*, 450 FSupp 1097 (D. Hawaii 1978), aff'd, 607 F2d 827 (9th Cir. 1979). In either case it seems clear to Petitioners that a grossly inaccurate and incomplete "summary" presented by a prosecutor not under oath is no less harmful than the one presented by a government agent or other witness under oath. In fact, the former is obviously more insidious since grand jurors are not likely to challenge an Assistant United States Attorney or question the accuracy of his comment.

The evidence eventually produced at trial did not conform to the prosecutor's improper "summary". This is apparent from the fact that those Defendants charged in all counts were acquitted on 65 counts and one was acquitted on all counts. Furthermore, the government has to this day never explained nor did the Court of Appeals notice that Petitioner Amicarelli was actually charged with aiding and abetting in certain counts where patients were seen, examined and received medical tests or x-rays while Petitioner Amicarelli was off sick with hepatitis. See at p. A-66. Petitioners' Sentencing Memorandum is reproduced at Appendix pp. A-65–A-72. Moreover, Petitioners contend that the record shows in this case that the grand jury was not fully and fairly informed and did not independently

evaluate evidence. This is underscored by the charging document itself since the indictment contains two (2) separate counts based on the identical same conduct and same check. (See Counts 147 and 153 of indictment, page A-28).

Petitioners contest the notion that the prosecutor's conduct in the instant case was appropriate. Nor is it fair to characterize the remarks as "offhand". The prosecutor made no effort to qualify his responses. He gave lengthy, detailed responses obviously implying familiarity with the "statements" of many witnesses. Moreover, it should have been evident to the Court of Appeals that the grand jury room is the private preserve of the prosecutor. Where he gives detailed answers inaccurately conveying evidence or makes prejudicial insinuations without basis in fact, it simply runs afoul of common sense to suggest that such actions do not impinge upon the ability of the grand jury to exercise independent judgment.

The litmus to gauge the prosecutor's faithfulness to important Fifth Amendment principles here may first be found in the prosecutor's willingness to subpoena Petitioners Bigley, Amicarelli and one other physician who was later indicted. Petitioners have always noted that it is contrary to the published policy of the United States Department of Justice to subpoena a known target of investigation without providing a supplemental warning to be administered on the record. See United States Attorney's Manual Title 9, Chapter 11, page 12. Petitioners recognize that this Justice Department policy does not create a procedural right. Yet, Petitioners also recognize that the apparent willful disregard for the policy demonstrates a state of mind which in the specific context of facts herein has probative value on the issue of intentional grand jury misconduct.

Petitioners Amicarelli and Bigley abide by their belief that the prosecutor improperly assailed their credibility as well as injected inflammatory speculation without any basis in fact that they were engaged in criminal activity in Florida. The Court of Appeals' opinion, however, misconstrues a comment implying misconduct in New York as an "admonition" curing the reference to possible criminal conduct in Florida.

> "A JUROR: Did this New York thing come up before?
>
> MR. SOISSON: I never heard of it, that is New York's problem.
>
> A JUROR: I don't know. It might have been another one of those mills if he didn't think it was unusual.
>
> MR. SOISSON: I wouldn't doubt it a bit. He might even be operating one in Florida right now."
>
> p. A-58.

Nor can it be suggested that a fair reading of the grand jury minutes yields any conclusion other than that the prosecutor was attacking the veracity of both Petitioners Bigley and Amicarelli immediately after their testimony. Why else would the prosecutor suggest that they were "not necessarily selected because of their veracity . . ." p. A-53. And the prosecutor's disingenuous remark concerning the circumstance of their appearance underscores Petitioners' common sense view of the record. The prosecutor actually told the grand jury that Petitioners were selected because the government had been "unable to contact and interview them before". p. A-53. This comment of course makes little sense in light of the fact the government was obviously able to contact both Petitioners Bigley and Amicarelli, serve them a subpoena and they traveled to Detroit from Orlando, Florida to provide their testimony.

The prosecutor in his response in the District Court asserted that his damaging commentary was not prejudicial. He also suggested that Petitioners were simply complaining because he had failed to present all evidence available at the grand jury proceedings. Indeed, in the District Court the prosecutor suggested that a grand jury investigation was meant to be "a one-sided affair", and the grand jury itself was merely "an investigative prosecutorial arm of the executive branch of government". The government's answer is reproduced in the Appendix at pp. A-60–A-64. Far from failing to present favorable evidence to the grand jury, the prosecutor not only mischaracterized Dr. Nelson's information as previously discussed herein, but more significantly provided a mountain of his own unsworn conjecture and opinion which added a false aura of factual support to the government's case and may well have deceived the grand jurors. *United States* v *Hogan, supra*. Thus, the prosecutor in both word and action casually ignored and denigrated important constitutional principles. Quite frankly, however, "the grand jury is not meant to be the private tool of a prosecutor", *United States* v *Fisher*, 455 F2d 1101, 1105 (2d Cir. 1972).

The record of improprieties is clear. The prosecutor testified that the Hamilton Clinic was ". . . nothing more than a mill . . ." He testified that the clinic was "entirely unethical . . ." He insinuated racist motives. He testified that "everybody got the same tests". He insinuated that the only reason any patients went to Hamilton Clinic was to collect money. He testified that all of the persons going to the clinic were "phony patients".[5] And, of

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[5] The overwhelming majority of patients produced at trial, however, testified that they had legitimate physical problems and valid symptoms which were far-ranging. See Petitioner Amicarelli's Sen-

(*concluded on page 14*)

course, he bolstered his unsworn opinion about unnecessary medical testing by corroborating it with the opinion of his own personal and unnamed physician:

> "MR. SOISSON: . . . You know, I can't see it myself. I don't think my doctor would do that to me." p. A-59.

Petitioners respectfully submit, however, it should never be deemed appropriate for a prosecutor to supplant real evidence with his own personal opinion. The Court of Appeals, however, chose to view the transcript of grand jury proceedings in a wooden and unrealistic manner. The use of unsworn "summary" responses and a paraphrase of prospective testimony of witnesses who, in fact, were never presented, necessarily manipulated the grand jury, deprived them of their independence and tainted any subsequent indictment. A grand jury is entrusted with enormous investigative powers so that it can function as an independent jury reviewing evidence, assessing witness credibility, analyzing and sifting through conflicting facts and testimony in order to determine the sufficiency and appropriateness for indictment of fellow citizens. This responsibility is not delegated to an Assistant United States Attorney. It is anomalous to implicitly suggest, as the Court of Appeals' opinion has done, that the prosecutors may relieve the grand jury of

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(*continued from page 13*)

tencing Memorandum. Interestingly, the prosecutor implied that any employee who worked at the clinic for a substantial time could be a target, yet none of those others were charged or given immunity because the government (not the grand jury) concluded they were not culpable. These included other professionals and another radiologist who performed the same function as Petitioner Azad. See Petitioner Amicarelli's Sentencing Memorandum at 3, Appendix pp. A-66 – A-67. The radiologists performed their task of reading x-rays in a building separate from the clinic. Thus, non-indicted and non-culpable professionals who allegedly "wrote" the lie were not charged, but the man who merely "read" the lie, Petitioner Azad, was.

their task by improper prosecutorial comment. The Sixth Circuit's measure of what is appropriate is the wrong one. The case of *United States* v *Griffith, supra,* is obviously predicated upon the notion that a constitutional violation cannot undermine the jury's ability to make an informed and objective evaluation per se. Unfortunately, such a view eliminates the need for a grand jury and those functions entrusted to the jury may instead be wielded by a government attorney relegating the grand jury's role to that of a rubber stamp. This Court must intervene and actively reaffirm those principles so essential to the grand jury process. A grand jury investigation should never be subverted or transformed into an empty ritual or elaborate charade. As stated by the United States Court of Appeals for the Ninth Circuit:

> "If the grand jury is to accomplish either of its functions, independent determination of probable cause that a crime has been committed and protection of citizens against unfounded prosecutions, limits must be set on the manipulation of grand juries by over zealous prosecutors." *United States* v *Samango,* 607 F2d 877, 882 (9th Cir. 1979).

II.

IMPROPER PROSECUTORIAL COMMENT BEFORE THE GRAND JURY CONSTITUTES ADEQUATE GROUND FOR DISCLOSURE OF OTHER MATTERS OCCURRING BEFORE THE GRAND JURY PURSUANT TO RULE 6(C)(ii), FEDERAL RULES OF CRIMINAL PROCEDURE.

By deeming the prosecutor's conduct appropriate, the Court of Appeals conveniently eliminated any need to discuss the question of when a criminal defendant is entitled to discovery of grand jury materials. Petitioners contend here that their Fifth Amendment right to be indicted only by a legally constituted and unbiased grand

jury was at issue in the District Court. Because the prosecutor gave false, prejudicial, unsworn testimony, much of which was misleading to the grand jury, it was both appropriate and imperative that the District Court allow access to the balance of grand jury proceedings.

What has always been clear to Petitioners was that other than three (3) witnesses that the government later indicted (Petitioners Amicarelli, Bigley, and Co-Defendant Dean) and a solitary patient, i.e., Johnny Cobb, the government presented no other witnesses to the grand jury other than possibly a case agent who would have presented some kind of summary or synopsis.[6]

Of course, Mr. Cobb's testimony as a lay person could not and did not demonstrate lack of medical necessity with regard to the many patient files relating to the various counts in the indictment. Thus, it is readily apparent that there was no expert testimony to support any conclusion regarding medical or chiropractic necessity other than those comments at issue here. Under these circumstances Petitioners did demonstrate adequate grounds for further disclosure.

Petitioners submit that this Court's ruling in *United States* v *Mechanik*, ___ U.S. ___ (1986), militates in favor of more liberal pretrial disclosure because the Court clearly recognized that dismissal of the indictment is indeed an appropriate remedy for a violation of Rule 6 of the Federal Rules of Criminal Procedure. The Fifth Amendment right to an indictment by an unbiased grand jury, the procedural and ethical obligations of the United States Attorney and the societal interest in protecting the in-

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[6] Petitioners drew such reasonable conclusion from the fact that no other Jencks material was disclosed other than that mentioned above. And the case agent did not testify, therefore, his Jencks material was not disclosed. The government has never challenged the accuracy of this suggestion.

tegrity of the grand jury process call for no less consideration. As observed by Justice Marshall in *Mechanik:*

> "Respect for the rule of law demands that improperly procured indictments be quashed even after conviction, because only by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured; for in modern times, all prosecution is in the hands of officials." (Citation omitted)

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1986

MICHAEL BIGLEY, GENE AMICARELLI and SALEEM AZAD,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed December 5, 1986)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SALEEM AZAD (85-1866), GENE AMICARELLI (85-1867), MICHAEL BIGLEY (85-1868), Defendants-Appellants — ON APPEAL from the United States District Court for the Eastern District of Michigan; Nos. 85-1866/1867/1868)

Before: ENGEL, NELSON and RYAN, Circuit Judges.

PER CURIAM.

In the course of their trial for mail fraud in connection with the operation of the Hamilton Clinic — a clinic that

provided unnecessary medical and chiropractic treatment to patients insured by Blue Cross/Blue Shield — appellants Michael Bigley, Saleem Azad, and Gene Amicarelli entered into plea agreements conditioned on their being allowed to challenge certain pre-trial orders on appeal. We find the challenge unavailing, and we shall affirm the judgments entered on the guilty pleas.

A federal grand jury handed down [*sic*, up] a 155 count indictment on November 30, 1984, charging eleven individuals, including the three appellants, with a scheme to defraud Blue Cross/Blue Shield of Michigan through the operation of the Hamilton Clinic. Azad was a radiologist at the clinic from July, 1981, until September, 1982. Bigley and Amicarelli were chiropractors at the clinic, Bigley having been employed there from November, 1981, until September, 1982, and Amicarelli from January to September of 1982.

According to the indictment, insured patients visiting the clinic "would be given a series of medical tests, which were unnecessary services, and which were administered primarily for the purpose of receiving payment" from Blue Cross/Blue Shield. Detailing the operation of the clinic, the indictment charged that a patient would first be directed to the chiropractic side of the clinic, where he would undergo a series of back and neck x-rays. The patient would then be directed to the medical side for further x-rays and medical tests. Upon completion of the medical tests, the patient would return to the chiropractic side to receive "some kind of massage or manipulation." At the end of treatment the patient would "be paid $30 or $50 by an employee of Hamilton Clinic using the pretext that the subscriber would do a 'commercial' for Hamilton Clinic."

The indictment further asserted that Blue Cross/Blue Shield routinely informed medical providers, such

as the Hamilton Clinic, that its insurance contracts only covered "necessary services." Services "not required in and directly related to . . . diagnosis or treatment of injury" were not covered. The fraud upon Blue Cross/ Blue Shield consisted in the "false and fraudulent pretense that the tests and services" provided to the patients by the Hamilton Clinic "were necessary and for the purpose of diagnosis and treatment of an illness or injury." The true facts were that "in general [Blue Cross/ Blue Shield] subscribers who visited the Hamilton Clinic were not present because of injury or illness," but reported injury or illness in order to receive the $30 or $50 payment.

The indictment lists 155 separate mailings made in violation of the mail fraud statute, 18 U.S.C. § 1341. The mailings included checks for payment to the clinic for services furnished to subscribers of Blue Cross/Blue Shield insurance. Each count listed the check number, the mailing date, and the check amount.

Pre-trial motions filed by the appellants included a motion to dismiss the indictment because of alleged prosecutorial misconduct before the grand jury and a motion for disclosure of the grand jury proceedings. Appellants also moved to dismiss the indictment for vagueness, to provide a bill of particulars, and to strike surplusage in the indictment. Azad, Amicarelli, and Bigley appeal the denial of these motions.

Jury selection began on June 6, 1985. Bigley and Amicarelli entered into their plea agreements on July 24, 1985, well into trial. Azad followed their example shortly thereafter. Bigley pleaded guilty to two counts and was sentenced to a prison term of 18 months and three years of probation. Bigley was also ordered to pay $7,905.40 in restitution plus a $1,000 fine. Azad entered a plea of guilty to two counts and was sentenced to one year of

confinement and a year of probation. Azad promised to make restitution of $40,000 to the health insurance carrier prior to sentencing. Amicarelli pleaded guilty to a single count and was sentenced to imprisonment for one year and a $1,000 fine.

* * *

Appellants initially complain of the Assistant United States Attorney's conduct before the grand jury on April 5, 1984 — a date over seven months prior to the return of the indictment. Appellant Amicarelli testified before the grand jury on that date, and a short discussion took place between the Assistant United States Attorney, Mr. William F. Soisson, and the grand jurors immediately following Amicarelli's departure from the grand jury room. This discussion spans only nine pages of the grand jury transcript, but appellants argue that a multitude of sins are recorded in those nine pages, including rendering unsworn testimony, offering personal opinions concerning witnesses' credibility, and speculating in an inflammatory manner.

This Circuit applies a strict standard for dismissal of an indictment because of alleged prosecutorial misconduct before the trand jury. The appellants must demonstrate that "prosecutorial misconduct is a long-standing or common problem in grand jury proceedings in [the] district." *United States* v. *Griffith*, 756 F.2d 1244, 1246 (6th Cir.), *cert. denied*, __ U.S. __, 106 S.Ct. 114 (1985). In addition to showing long-standing misconduct, "a defendant who seeks dismissal of an indictment . . . must show that he was prejudiced by the prosecutor's actions" before the grand jury. *Id.* Prejudice is only possible, of course, if there was some actual impropriety by the government's attorney. We agree with the district court's conclusion, made after a hearing held on March 19, 1985, that no abuse was demonstrated here.

What is termed by appellant Bigley the "most blatant and prejudicial" of the supposed errors is Mr. Soisson's alleged presentation of unsworn testimony to the grand jury. The most egregious exemplar is considered to be Mr. Soisson's reference to a Dr. William Nelson's expected testimony. However, as appellants perhaps unintentionally admit, the Assistant United States Attorney's comments were but a "summary." Mr. Soisson was not purporting to act as a witness; he said "I believe that [Dr. Nelson] would testify" that the Hamilton Clinic was nothing more than a "mill" and that the operation was "unethical." It is apparent from the other references objected to that the prosecutor made clear that he was merely giving the grand jurors a preview of expected testimony, and was not acting as a witness himself. When a grand juror asked the prosecutor to explain the general theory of the indictment, and to pinpoint evidence on how the Hamilton Clinic operated, it was appropriate for Mr. Soisson to refer to the anticipated testimony and its expected source.

Appellants also complain of "highly perjorative" and prejudicial remarks regarding the veracity of Amicarelli and Bigley, and a comment referring to Amicarelli's possible operation of a chiropractic "mill" in Florida. Again, however, our interpretation of these off-hand remarks differs from the appellants'. The attorney for the United States did not directly attack the appellants' veracity, but simply noted that Bigley and Amicarelli could be considered targets of the investigation. We do not find the single comment regarding Amicarelli's business in Florida significant, particularly in view of Mr. Soisson's immediately preceding admonition to a grand juror that Amicarelli's former chiropractic practice in New York was "New York's problem," and not the concern of the Michigan grand jury.

Although we do not reach the issue of prejudice, since Mr. Soisson's replies were not inappropriate, it ought be pointed out that appellants' perception that the grand jurors were somehow swayed by Mr. Soisson's answers to their questions is based upon a misreading of the transcript. The grand jurors asked pointed questions about the direction of the investigation and injected their own opinions regarding the worth of the witnesses' testimony. There is no indication that Mr. Soisson's comments had any effect on the grand jurors' estimation of the culpability of Azad, Amicarelli, and Bigley.

The district court's denial of the motion for dismissal of the indictment was clearly correct. Because there was no prosecutorial impropriety, similarly, the district court did not abuse its discretion in denying appellants' motion for disclosure of grand jury proceedings. There is a strong policy in favor of maintaining the secrecy of grand jury proceedings. *United States* v. *Short*, 671 F.2d 178, 184 (6th Cir.), *cert. denied*, 457 U.S. 1119 (1982). Disclosure is proper only on a showing of "compelling necessity" and "particularized need." *Id.*, *United States* v. *Linsinski*, 728 F.2d 887, 893 (7th Cir.), *cert. denied*, 469 U.S. 832 (1984). Lacking any demonstration of prosecutorial misconduct, Azad, Amicarelli, and Bigley have failed to meet the requisite standards for disclosure of otherwise secret grand jury proceedings. A presumption of regularity attaches to grand jury proceedings, and appellants have failed to carry the "difficult burden" of proving any irregularity. *United States* v. *Battista*, 646 F.2d 237, 242 (6th Cir.), *cert. denied*, 454 U.S. 1046 (1981). The requested wide ranging search into the grand jury transcript was properly rejected.

* * *

Apart from allegations of prosecutorial misconduct, appellants urge that the indictment itself was impermis-

sibly vague and should have been dismissed, or at least augmented with a bill of particulars. Because the scheme to defraud involved the provision of unnecessary services, Amicarelli, Bigley and Azad maintain that the indictment had to list the particular unnecessary services, the specific patients concerned, and the role of each defendant in the scheme. Emphasizing that thousands of patients were arguably included within the 155 count indictment, appellants tell us that trial preparation was virtually impossible under the indictment as drawn. We reject these contentions, as did the district court.

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). The language of the statute violated may be followed in the indictment, "but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, commencing under the general description, with which he is charged." *Id.* at 117-118 (quoting *United States* v. *Hess*, 124 U.S. 483, 487 (1888)). The Federal Rules of Criminal Procecure adopt this framework by requiring that the "indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Rule 7(c), Fed.R.Crim.P.

The mail fraud statute requires the establishment of but two elements: "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." *United States* v. *Valavanis*, 689 F.2d 626, 627 (6th Cir. 1982). The indictment here, including the various counts to which the three appellants pleaded guilty, obviously sets forth the two elements of the mail

fraud statute. The indictment also provides the details of how this particular scheme operated to defraud Blue Cross/Blue Shield. In short, subscribers of Blue Cross/ Blue Shield were induced to come to the Hamilton Clinic by the prospect of a $30 or $50 payment at the end of their "treatment." Blue Cross/Blue Shield was defrauded by the false claim that payments were being made for "necessary services." What distinguishes this indictment from the indictment found defective in *United States* v. *Curtis*, 506 F.2d 985 (10th Cir. 1974), an opinion cited by appellants, is the clear and specific description of the fraudulent scheme found in the present indictment. The indictment before us does provide some "substantial indication of the nature or character" of the scheme involved, and "the scheme itself need not be pleaded with all the certainty in respect of time, place, and circumstance requisite in charging the mailing of the letter or other matter." *Id.* at 990. As far as the circumstances of the mailing are concerned, each count in the present indictment includes the mailing date of checks received from Blue Cross/Blue Shield, as well as the number and amount of the checks in question.

The second function of the indictment, that it "enables [each defendant] to plead an acquittal or conviction in bar of future prosecutions for the same offense," *Hamling* v. *United States*, 418 U.S. at 117, has been adequately discharged here. Protection against double jeopardy is provided not only by the indictment, but by the entire record in the first prosecution. *United States* v. *Radetsky*, 535 F.2d 556, 563 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976). It is the "record [that must show] with accuracy" whether double jeopardy may later be pleaded. *Russell* v. *United States*, 369 U.S. 749, 764 (1962). The record of this case poses no problem in that regard.

The further constitutional protection afforded by an indictment — that the defendant be tried on charges

made by the grand jurors and not the prosecutor — is not lost simply because counts of the indictment covered multiple patients or procedures. This conclusion is actually supported by *United States* v. *Radetsky*, 535 F.2d 556 (10th Cir. 1976), on which appellants rely. That case involved an indictment of a physician under the false statement statute, 18 U.S.C. § 1001, for the submission of false Medicare claim forms. The indictment was held constitutionally adequate even though it included some counts that encompassed numerous medical procedures — thereby allowing the prosecutor great leeway in choosing the particular procedure to be presented to the jury as having been falsely stated. Even if *Radetsky* had found the indictment deficient, moreover, which it did not, *Radetsky* involved 18 U.S.C. § 1001; the present appeal concerns 18 U.S.C. § 1341. A false statement is at the foundation of a violation of 18 U.S.C. § 1001; *United States* v. *Godwin*, 566 F.2d 975, 976 (5th Cir. 1978); *United States* v. *Gilbertson*, 588 F.2d 584, 589 (8th Cir. 1978), while the scheme to defraud and the use of the mails are essential for conviction under the mail fraud statute. *United States* v. *Valavanis*, 689 F.2d 626, 627 (6th Cir. 1982). There might have been doubts in *Radetsky* as to the exact false statements charged by the grand jury, given the numerous procedures included in each count, but there is no doubt here as to the scheme and the mailings charged.

Finally, we are not persuaded that as a practical matter the indictment made it impossible for defense counsel to prepare for trial because of the potentially large number of patients and procedures covered by the 155 counts. As previously indicated, the scheme alleged was clear and the detailing of the use of the mails precise. We were told at oral argument that the medical and chiropractic files of the 75 or so patients who were potential trial witnesses were available for defense in-

spection some months prior to trial, and defense counsel did not take exception to this representation.

Under Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure, the government is required upon the request of the defendant to permit inspection of any papers or documents in the government's possession that are material to the preparation of the defense or are intended for use by the government as evidence in its case in chief. Such a defense request was served on February 8, 1985. Mr. Soisson's response of February 28, 1985, indicates that the government was already complying with the requirements of Rule 16. In any event, the district court granted a motion for discovery on April 1, 1985. No violation of Rule 16 is complained of, and the appellants clearly had an opportunity to peruse the medical records of expected patient witnesses long before trial.

Since the indictment was sufficiently specific to inform the various defendants of the charges against them, to protect them from double jeopardy, and to enable preparation for trial, the appellants' motion to dismiss was properly denied. Given the sufficiency of the indictment, we find no abuse of discretion in the district court's concomitant denial of appellants' motion for a bill of particulars. *United States* v. *Birmley*, 529 F.2d 103, 108 (6th Cir. 1976). We also see no abuse of discretion in the district court's decision not to strike, as surplusage, the dollar amounts listed in the numerous counts of the indictment.

The judgments entered by the district court upon the guilty pleas of Azad, Bigley, and Amicarelli are AFFIRMED.

MOTION TO PUBLISH

(United States Court of Appeals for the Sixth Circuit)

(Dated December 12, 1986)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, -v- SALEEM AZAD (85-1866), GENE AMICARELLI (85-1867), and MICHAEL BIGLEY (85-1868), Defendants-Appellants — 6th Cir. Nos. 85-1866, 85-1867, 85-1868)

The United States of America, by and through its undersigned counsel, moves the court to designate its opinion in the above-captioned case to publication pursuant to Rule 24 of the local rules of this court. In support of this motion, counsel state the following:

1. The per curiam opinion issued on December 5, 1986, was not recommended for publication by the panel.

2. This court has not previously addressed, in a published opinion, a claim of prosecutorial misconduct or grand jury abuse which is factually similar to that raised in this case. However, similar allegations are made frequently by defense counsel. We believe it would be helpful to the trial courts of this circuit to be able to rely on this court's analysis of the question.

3. In addition, the court's discussion of the sufficiency of the indictment would assist in the resolution of another commonly recurring issue. Although the principles upon which the court relied are not novel, the application of those rules to a complex mail fraud scheme by a medical clinic is instructive.

For these reasons, we request the court to designate its per curiam opinion for official publication.

Respectfully submitted,

ROY C. HAYES
United States Attorney
/s/ F. WILLIAM SOISSON
Assistant U.S. Attorney
817 Federal Building
Detroit, Michigan 48226

Dated: December 12, 1986

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals for the Sixth Circuit)

(Filed January 19, 1987)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GENE AMICARELLI (85-1867), MICHAEL BIGLEY (85-1868), Defendants-Appellants — No[s]. 85-1867/8)

BEFORE: ENGEL, NELSON and RYAN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

INDICTMENT

(United States District Court —
Eastern District of Michigan — Southern Division)

(November 30, 1984)

(UNITED STATES OF AMERICA, Plaintiff, - vs - JAMES DEMIDO, GREGORY CARNILL, SALEEM AZAD, KIZAH-KEYVERTIL USMAN, STANLEY RAPPAPORT, JOHN DEAN, GENE AMICARELLI, MICHAEL BIGLEY, FARRIS TARAZI, RICHARD NOTT, BOBBY MEADE, Defendants — CRIMINAL NO. 84 CR 20660 DT; VIO: 18 U.S.C. § 1341)

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH ONE HUNDRED FIFTY-FOUR
(MAIL FRAUD — 18 U.S.C. §1341)

I. At all times pertinent to the counts charged in this indictment:

(A) Blue Cross/Blue Shield of Michigan (hereinafter BCBSM) was a major health care insurance company authorized and licensed to do business in the State of Michigan.

(B) In the course of its business BCBSM had assigned provider numbers to various medical doctors (M.D.'s), osteopaths (D.O.'s), chiropractors (D.C.'s), medical laboratories, and other providers of health care services. These provider numbers allow health care providers to bill BCBSM directly, and subsequently to be paid directly, for services rendered by the providers, within the scope of their respective professions, to BCBSM subscribers (patients).

(C) BCBSM routinely issued copies of its *Physician's Manual* to all BCBSM providers. The *Physician's Manual*

advised the providers that under the terms of BCBSM group health care insurance contracts:

> "Except as limited or excluded, payment for services rendered by physicians in the diagnosis or treatment of disease or injury will be paid . . ."

And,

> "Services not required in and directly related to . . . diagnosis or treatment of illness and injury are excluded as benefits, such as, examinations and tests in connection with research studies; screening procedures; routine or periodic physical examinations; and pre-marital or pre-employment, or sports examinations."

Services which meet the above standards established in the *Physician's Manual* are hereinafter referred to as "necessary services".

(D) BCBSM accepts claims from providers in both written (hard copy) and computer formats. In either instances, BCBSM will pay claims for covered services only if the provider certifies, or has certified, that the services were "performed personally or under the provider's direct and personal supervision and in provider's presence . . ."

II. That during the periods of their employment or association with Hamilton Clinic as specified in paragraphs two and three of this indictment JAMES DEMIDO, GREGORY CARNILL, SALEEM AZAD, KIZAHKEYVERTIL USMAN, STANLEY RAPPAPORT, JOHN DEAN, GENE AMICARELLI, MICHAEL BIGLEY, FARRIS TARAZI, RICHARD NOTT and BOBBY MEADE, defendants herein, devised and intended to devise and aided and abetted one another in a scheme to defraud Blue Cross/Blue Shield of Michigan and to obtain money through the use and by means of false and fraudulent pretenses and representations in the manner and means as follows:

1. During the time period relevant to this indictment:

   a) JAMES DEMIDO was a chiropractor, licensed by the State of Michigan, was an authorized provider of services for BCBSM subscribers, and was assigned Provider Code No. OH25289.

   b) GREGORY CARNILL was a chiropractor, licensed by the State of Michigan, was an authorized provider of services for BCBSM subscribers and was assigned Provider Code No. OQ25056.

   c) SALEEM AZAD was a medical doctor, licensed by the State of Michigan, was an authorized provider of services for BCBSM subscribers and was assigned Provider Code No. 3820091.

   d) KLZAHKEYVERTIL [*sic*] USMAN was a medical doctor licensed by the State of Michigan, was an authorized provider of services for BCBSM subscribers and was assigned Provider Code No. 2820170.

   e) STANLEY RAPPAPORT was a doctor of Osteopathic medicine, licensed by the State of Michigan, was an authorized provider of services for BCBSM subscribers and was assigned Provider Code No. 5821507.

   f) JOHN DEAN was a doctor of Osteopathic medicine, licensed by the State of Michigan, was an authorized provider of services for BCBSM subscribers and was assigned Provider Code No. 8630400.

   g) GENE AMICARELLI was a chiropractor, licensed by the State of Michigan, was an authorized provider of services for BCBSM subscribers and was assigned Provider Code No. OQ25070.

h) MICHAEL BIGLEY was a chiropractor, licensed by the State of Michigan but was not an authorized provider of services for BCBSM subscribers.

2. Between July of 1981 and September of 1982, JAMES DEMIDO operated a business known as Hamilton Clinic located at 16360 Hamilton, Highland Park Michigan.

3. Defendants GREGORY CARNILL, SALEEM AZAD, KIZAHKEYVERTIL USMAN, STANLEY RAPPAPORT, JOHN DEAN, GENE AMICARELLI, MICHAEL BIGLEY, FARRIS TARAZI, RICHARD NOTT and BOBBY MEADE were employed at the Hamilton Clinic during the approximate times specified below in the capacities as shown:

a) GREGORY CARNILL was employed as a chiropractor from July of 1981 to September 1982.

b) SALEEM AZAD was employed as a medical doctor and radiologist from July 1981 to September of 1982.

c) KIZAHKEYVERTIL USMAN, was employed as a medical doctor from July of 1981 to February of 1982.

d) STANLEY RAPPAPORT was employed as an Osteopath from April of 1982 to September of 1982.

e) JOHN DEAN was employed as an Osteopath from July of 1982 to September of 1982.

f) GENE AMICARELLI was employed as a chiropractor from January 1982 to September of 1982.

g) MICHAEL BIGLEY was employed as a chiropractor from November of 1981 to September of 1982.

h) FARRIS TARAZI was employed in a management or administrative capacity from July of 1981 to September of 1982.

i) RICHARD NOTT was employed in a management or administrative capacity from October of 1981 to September of 1982.

j) BOBBY MEADE was employed in a management or administrative capacity from November of 1981 to September of 1982.

4. BCBSM was billed for medical services allegedly performed at the Hamilton Clinic in the following fashion:

a) JAMES DEMIDO billed BCBSM for medical services under his provider number. Between October 1981 and August 1982 BCBSM paid approximately $287,000 as the result of said billings. BCBSM checks in payment of the billings were payable to James Demido D.C., 16350 Hamilton, Highland, [*sic*, Park], Michigan.

b) GREGORY CARNILL billed BCBSM for medical services under his provider number. Between February 1982 and July 1982 BCBSM paid approximately $179,000 as the result of said billings. BCBSM checks in payment of the billings were payable to Hamilton Clinic, 16350 Hamilton, Highland Park, Michigan.

c) SALEEM AZAD billed BCBSM for medical services under his provider number. Between October 1981 and September 1982 BCBSM paid approximately $903,000 as the result of said billings. BCBSM checks in payment of the billings were payable to Hamilton Clinic, 16350 Hamilton, Highland Park, Michigan.

d) KIZAHKEYVERTIL USMAN billed BCBSM for medical services under his provider number.

Between October 1981 and March 1982 BCBSM paid approximately $221,000 as the result of said billings. BCBSM checks in payment of the billings were payable to Hamilton Clinic, 16350 Hamilton, Highland Park, Michigan.

e) STANLEY RAPPAPORT billed BCBSM for medical services under his provider number. Between May of 1982 and September 1982 BCBSM paid approximately $581,000 as the result of said billings. BCBSM checks in payment of the billings were payable to Stanley Rappaport D.O., 24500 Ford Road, Dearborn, Michigan.

f) JOHN DEAN billed BCBSM for medical services under his provider number. Between July 1982 and September 1982 BCBSM paid approximately $158,000 as the result of said billings. BCBSM checks in payment of the billings were payable to John Dean, D.O., P.C., 2336 Highland Road, Highland Park, Michigan.

g) Medical services allegedly performed by MICHAEL BIGLEY and GENE AMICARELLI were billed to BCBSM under provider numbers assigned to JAMES DEMIDO and GREGORY CARNILL.

5. It was part of the scheme to defraud that BCBSM subscribers would visit Hamilton Clinic and would be given a series of medical tests, which were unnecessary services, and which were administered primarily for the purpose of receiving payment from BCBSM. Upon entering Hamilton Clinic the following would occur:

a) The BCBSM subscriber would be directed to the chiropractic portion of Hamilton Clinic

and undergo a series of x-rays of the back and neck.

b) The BCBSM subscriber would be directed to the medical portion of Hamilton Clinic and would undergo a series of tests such as x-rays of the back, neck, skull and extremities, pulmonary function tests, electrocardiograms, ultrasounds, dopler tests and chest x-rays. An employee of Hamilton Clinic would also draw several tubes of blood from the subscriber and the subscriber would provide a urine specimen. The blood and urine samples would be analyzed at the Hamilton Clinic and sent to Detroit Bio-Medical Laboratories, Inc. or another laboratory for analysis.

c) Upon completion of the testing the BCBSM subscriber would be sent to the chiropractic portion of the clinic where he would receive some kind of massage or manipulation.

d) The BCBSM subscriber would then be paid either $30 or $50 by an employee of Hamilton Clinic using the pretext that the subscriber would do a "commercial" for Hamilton Clinic.

6. It was further part of the scheme to defraud that:

a) The defendants caused false and fraudulent claims for chiropractic and medical tests and services to be sent to BCBSM upon the false and fraudulent pretense that the tests and services were necessary and for the purpose of diagnosis and treatment of an illness or injury.

b) The claim forms submitted to BCBSM contained diagnosis codes representing the subscriber's illness or injury.

c) The BCBSM subscribers visiting Hamilton Clinic for the most part did not see a medical doctor or osteopath and a medical doctor or osteopath did not objectively or personally diagnose the conditions cited on the claim forms as justification for the medical procedures bill to BCBSM.

7. In executing the scheme to defraud the defendants knew or had reason to know:

a) That BCBSM would pay only for "necessary services" performed personally by the provider or under the provider's direct and personal supervision and in the provider's presence.

b) That the only chiropractic services for which BCBSM would pay were x-rays of the spine in connection with diagnosis or treatment of illness or injury and emergency first aid for a spinal injury.

c) That no doctor/patient relationship existed between BCBSM subscribers who visited Hamilton Clinic and those physicians who caused billings to be sent BCBSM for medical tests and procedures performed on the subscribers.

d) That in general BCBSM subscribers who visited the Hamilton Clinic were not present because of injury or illness. That said subscribers reported injury or illness to various employees of the Hamilton Clinic in order that they would be accepted by the clinic and receive the previously described $30 or $50 payment.

8. It was part of the scheme to defraud that in addition to receiving payment for subjecting themselves to various medical tests, BCBSM subscribers and others would receive payments for referring other BCBSM subscribers to the Hamilton Clinic.

COUNTS ONE THROUGH ONE HUNDRED SEVENTEEN

That on or about the dates set forth below, in the Eastern District of Michigan, Southern Division, JAMES DEMIDO, GREGORY CARNILL, SALEEM AZAD, KIZAH-KEYVERTIL USMAN, FARRIS TARAZI, RICHARD NOTT and BOBBY MEADE, defendants herein, having devised and for the purpose of executing the aforesaid scheme to defraud and to obtain money through the use of false and fraudulent pretenses and representations, did knowingly cause to be placed in an authorized depository for mail, to be sent and delivered by the United States Postal Service according to the directions thereon, letters from Blue Cross/Blue Shield of Michigan containing checks as described below, each such mailing constituting a separate count of this indictment; in violation of Title 18, Sections 1341 and 2, United States Code.

COUNT	*DATE ON OR ABOUT (MAILING DATE)*	*CHECK NO.*	*AMOUNT OF CHECK*
1	February 3, 1982	7501365	$ 203.50
2	January 20, 1982	7354528	$ 364.00
3	January 20, 1982	7376674	$ 354.00
4	January 13, 1982	7317616	$ 635.00
5	March 10, 1982	7834831	$ 6,150.00
6	March 10, 1982	7902581	$17,903.50
7	March 10, 1982	7902492	$13,560.75
8	February 24, 1982	7658484	$ 374.00
9	February 10, 1982	7568052	$ 252.00
10	February 10, 1982	7568498	$ 169.50
11	February 24, 1982	7685991	$ 332.00

COUNT	DATE ON OR ABOUT (MAILING DATE)	CHECK NO.	AMOUNT OF CHECK
12	January 13, 1982	7317620	$ 486.75
13	January 27, 1982	7407382	$ 364.00
14	February 10, 1982	7535451	$ 364.00
15	February 10, 1982	7568508	$ 209.50
16	February 17, 1982	7627994	$ 209.50
17	February 10, 1982	7568055	$ 644.00
18	February 10, 1982	7568511	$ 278.00
19	February 10, 1982	7568056	$ 687.00
20	February 24, 1982	7658488	$ 360.00
21	February 17, 1982	7627998	$ 226.50
22	February 10, 1982	7568513	$ 285.50
23	February 10, 1982	7568515	$ 252.00
24	February 17, 1982	7627601	$ 455.00
25	February 10, 1982	7575599	$ 427.10
26	January 27, 1982	7407389	$ 364.00
27	January 4, 1982	7209165	$ 364.00
28	January 27, 1982	7439710	$ 244.50
29	January 20, 1982	7376267	$ 650.50
30	January 13, 1982	7271128	$ 354.00
31	January 13, 1982	7317630	$ 700.00
32	February 24, 1982	7658496	$ 374.00
33	February 24, 1982	7685995	$ 278.00
34	February 17, 1982	7627608	$ 534.75
35	March 3, 1982	7888473	$14,719.00
36	February 3, 1982	7473624	$ 374.00
37	February 3, 1982	7501388	$ 244.50
38	February 10, 1982	7568531	$ 209.50
39	February 10, 1982	7535456	$ 354.00
40	February 10, 1982	7568538	$ 360.50
41	February 17, 1982	7628012	$ 194.50
42	February 10, 1982	7568069	$ 568.50
43	March 3, 1982	7888377	$14,822.75
44	November 25, 1981	6911626	$ 354.00
45	November 18, 1981	6876278	$ 491.00

COUNT	DATE ON OR ABOUT (MAILING DATE)	CHECK NO.	AMOUNT OF CHECK
46	November 18, 1981	6876676	$ 261.50
47	November 25, 1981	6950610	$ 280.50
48	January 4, 1982	7209177	$ 364.00
49	January 4, 1982	7229028	$ 599.47
50	January 13, 1982	7271140	$ 354.00
51	March 3, 1982	7880400	$14,313.00
52	February 24, 1982	7658505	$ 374.00
53	February 10, 1982	7568547	$ 246.00
54	February 10, 1982	7568075	$ 491.75
55	February 3, 1982	7473634	$ 364.00
56	February 10, 1982	7568548	$ 203.50
57	February 10, 1982	7568549	$ 257.50
58	February 3, 1982	7500973	$ 621.75
59	February 3, 1982	7501404	$ 208.00
60	February 24, 1982	7658510	$ 334.00
61	February 10, 1982	7568558	$ 319.50
62	February 10, 1982	7568083	$ 415.50
63	January 13, 1982	7271150	$ 364.00
64	January 13, 1982	7317647	$ 722.50
65	January 13, 1982	7318232	$ 319.50
66	January 27, 1982	7439766	$ 244.50
67	January 27, 1982	7407411	$ 374.00
68	February 3, 1982	7473647	$ 344.00
69	January 20, 1982	7376286	$ 635.25
70	January 27, 1982	7439344	$ 700.00
71	February 3, 1982	7501425	$ 169.50
72	January 29, 1982	7376693	$ 420.00
73	January 4, 1982	7209192	$ 354.00
74	January 20, 1982	7354548	$ 334.00
75	March 24, 1982	7924963	$17,180.00
76	January 13, 1982	7317654	$ 724.00
77	February 24, 1982	7685646	$ 529.10
78	January 27, 1982	7439782	$ 131.50
79	January 27, 1982	7407414	$ 374.00

COUNT	DATE ON OR ABOUT (MAILING DATE)	CHECK NO.	AMOUNT OF CHECK
80	January 27, 1982	7439789	$ 341.50
81	January 20, 1982	7376290	$ 631.00
82	February 3, 1982	7473655	$ 374.00
83	February 10, 1982	7568590	$ 272.00
84	February 3, 1982	7501445	$ 244.50
85	February 3, 1982	7500980	$ 512.50
86	February 24, 1982	7658530	$ 329.00
87	January 13, 1982	7271164	$ 374.00
88	January 13, 1982	7318258	$ 244.50
89	February 10, 1982	7568096	$ 599.00
90	December 2, 1981	6973889	$ 334.00
91	February 17, 1982	7601219	$ 339.00
92	November 25, 1981	6940646	$ 373.00
93	November 25, 1981	6940256	$ 557.00
94	January 4, 1982	7209200	$ 354.00
95	February 10, 1982	7535469	$ 354.00
96	January 4, 1982	7229398	$ 472.00
97	January 27, 1982	7439807	$ 160.50
98	January 4, 1982	7229051	$ 605.00
99	February 17, 1982	7601217	$ 364.00
100	February 17, 1982	7628038	$ 437.00
101	February 17, 1982	7627635	$ 640.50
102	February 3, 1982	7473659	$ 344.00
103	January 27, 1982	7439811	$ 214.50
104	December 2, 1981	7000030	$ 383.00
105	February 3, 1982	7501457	$ 172.00
106	February 10, 1982	7568602	$ 258.50
107	January 27, 1982	7439354	$ 735.00
108	March 10, 1982	7894445	$ 7,579.00
109	March 17, 1982	7917593	$ 1,461.75
110	February 17, 1982	7601227	$ 364.00
111	January 27, 1982	7439365	$ 613.00
112	February 24, 1982	7658548	$ 354.00
113	January 13, 1982	7318306	$ 257.00

COUNT	DATE ON OR ABOUT (MAILING DATE)	CHECK NO.	AMOUNT OF CHECK
114	December 16, 1981	7118066	$ 386.00
115	February 3, 1982	7473673	$ 344.00
116	January 27, 1982	7439846	$ 207.00
117	February 10, 1982	7568619	$ 192.00

COUNTS ONE HUNDRED EIGHTEEN THROUGH ONE HUNDRED FORTY-THREE

That on or about the dates set forth below, in the Eastern District of Michigan, Southern Division, JAMES DEMIDO, GREGORY CARNILL, SALEEM AZAD, STANLEY RAPPAPORT, GENE AMICARELLI, MICHAEL BIGLEY, FARRIS TARAZI, RICHARD NOTT and BOBBY MEADE, defendants herein, having devised and for the purpose of executing the aforesaid scheme to defraud and to obtain money through the use of false and fraudulent pretenses and representations, did knowingly cause to be placed in an authorized depository for mail, to be sent and delivered by the United States Postal Service according to the directions thereon, letters from Blue Cross/ Blue Shield of Michigan containing checks as described below, each such mailing constituting a separate count of this indictment; in violation of Title 18, Sections 1341 and 2, United States Code.

COUNT	DATE ON OR ABOUT (MAILING DATE)	CHECK NO.	AMOUNT OF CHECK
118	April 28, 1982	7996564	$10,298.00
119	April 28, 1982	8003628	$35,061.75
120	April 7, 1982	7953043	$10,725.00
121	April 14, 1982	7974703	$27,835.75
122	May 19, 1982	8044648	$ 9,023.00
123	July 7, 1982	8163185	$10,268.00
124	May 20, 1982	8067819	$34,596.45
125	May 19, 1982	8052229	$24,761.75
126	April 21, 1982	7981838	$10,336.00

COUNT	DATE ON OR ABOUT (MAILING DATE)	CHECK NO.	AMOUNT OF CHECK
127	April 14, 1982	7967181	$11,802.00
128	June 2, 1982	8096260	$49,800.80
129	March 17, 1982	7917512	$ 8,720.75
130	March 24, 1982	7932373	$16,078.95
131	March 31, 1982	7939021	$15,118.80
132	April 7, 1982	7960489	$25,533.90
133	May 26, 1982	8060498	$13,001.15
134	June 2, 1982	8088971	$12,276.00
135	May 26, 1982	8060115	$ 3,218.40
136	June 23, 1982	8132853	$10,769.00
137	June 30, 1982	8155036	$54,139.60
138	June 23, 1982	8139928	$34,498.40
139	June 9, 1982	8102896	$ 8,431.60
140	May 5, 1982	8013367	$ 7,210.00
141	May 5, 1982	8020820	$13,601.50
142	May 12, 1982	8036249	$18,573.25
143	June 16, 1982	8125155	$71,107.65

COUNTS ONE HUNDRED FORTY-FOUR THROUGH ONE HUNDRED FIFTY-FOUR [sic, -FIVE]

That on or about the dates set forth below, in the Eastern District of Michigan, Southern Division, JAMES DEMIDO, GREGORY CARNILL, SALEEM AZAD, STANLEY RAPPAPORT, JOHN DEAN, GENE AMICARELLI, MICHAEL BIGLEY, FARRIS TARAZI, RICHARD NOTT and BOBBY MEADE, defendants herein, having devised and for the purpose of executing the aforesaid scheme to defraud and to obtain money through the use of false and fraudulent pretenses and representations, did knowingly cause to be placed in an authorized depository for mail, to be sent and delivered by the United States Postal Service according to the directions thereon, letters from Blue Cross/Blue Shield of Michigan containing checks as described below, each such mailing constituting a sepa-

rate count of this indictment; in violation of Title 18, Sections 1341 and 2, United States Code.

COUNT	*DATE ON OR ABOUT (MAILING DATE)*	*CHECK NO.*	*AMOUNT OF CHECK*
144	July 14, 1982	8178316	$11,019.40
145	August 25, 1982	8272003	$34,162.25
146	August 11, 1982	8247597	$40,682.25
147	August 25, 1982	8275521	$ 7,486.50
148	July 21, 1982	8192186	$ 4,687.00
149	July 21, 1982	8199516	$23,272.25
150	September 1, 1982	8286361	$42,001.90
151	August 11, 1982	8243997	$ 6,679.00
152	August 18, 1982	8257974	$17,807.85
153	August 25, 1982	8275521	$ 7,486.50
154	September 1, 1982	8289910	$ 9,119.75
155	September 8, 1982	8304523	$13,321.75

THIS IS A TRUE BILL

_____
FOREPERSON

LEONARD R. GILMAN
United States Attorney
F. WILLIAM SOISSON (P24766)
Assistant United States Attorney

Dated: _____

TESTIMONY OF GENE AMICARELLI

(United States of America — United States District Court — Eastern District of Michigan — Southern Division)

(Proceedings of April 5, 1984)

(In the Matter of: GRAND JURY PROCEEDINGS; 84-3-24)

Proceedings had and testimony taken of GENE AMICARELLI, taken before a Federal Grand Jury at 950 Federal Building, Detroit, Michigan, on Thursday, April 5, 1984.

PRESENT: WILLIAM SOISSON,
Assistant United States Attorney.

(2) Detroit, Michigan
Thursday, April 5, 1984 — 1:03 p.m.

(William Soisson and Gene Amicarelli entered the Grand Jury Room.)

THE FOREPERSON: Will you raise your right hand, sir?

Do you solemnly swear that the testimony you will give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, I do.

EXAMINATION

BY MR. SOISSON:

Q. Would you state your name?

A. Gene Anthony Amicarelli.

Q. Your age?

A. Twenty Eight.

Q. Mr. Amicarelli, you have been supoenaed before this Grand Jury to testify with respect to certain allegations concerning violations of federal law. In an investi-

gation (3) of this type, it is the policy of the Department of Justice to advise every witness of their legal rights before testifying.

You need not make a statement or testify or answer any question you feel may tend to incriminate you. You may consult with an attorney or for that matter, any other person, before you make any statement or answer any question. You may not have a consultant with you in the Grand Jury Room but you could go outside and be excused to confer with him should you feel it necessary and return to the Grand Jury Room. If you have any doubt as to whether or not you should answer any questions, you should consult with that person before answering the question.

I wish to further advise you that this is a tribunal of the United States. You have taken an oath to tell the truth and your testimony is subject to possible prosecution for perjury or false declarations before a Grand Jury, should you knowingly make any false statements. The maximum penalty for perjury is five years imprisonment and/or a $2,000 fine; the maximum penalty for giving false statements before a Grand Jury is five years imprisonment and/or a $10,000 fine.

(4) Do you understand what I have just explained to you?

A. Yes, I do.
Q. Okay. And what is your profession?
A. I am a chiropractor.
Q. You are a doctor?
A. Yes.
Q. How long have you been a chiropractor?
A. Since January, '80.
Q. Where do you currently practice?
A. In Orlando, Florida.
Q. And you practice for Dr. Bigley?
A. Yes, I do.

Q. How long have you been associated with Dr. Bigley?

A. Oh, for about seven or eight years. We went to chiropractic school together.

Q. Where did you go to school at?

A. New York Chiropractic College.

Q. Have you been licensed in the State of Michigan?

A. Yes.

Q. Do you recall when you were first licensed in the State of Michigan?

A. I believe it was February, '82.

(5) Q. Okay. And what was the reason why you were licensed in the State of Michigan?

A. I had gotten a job here from Dr. Demido.

Q. When did you first get a job with Dr. Demido?

A. February 1, 1982.

Q. Did you go to work for him then?

A. Yes.

Q. How long did you work for him?

A. Up until August, '82.

Q. What were your general duties for Dr. Demido?

A. I was an examining physician in one of his clinics.

Q. That was Hamilton Clinic?

A. Yes.

Q. Could you describe what generally Hamilton Clinic was at the time you were there?

A. It was a chiropractic clinic. We examined patients, did chiropractic and orthopedic testing, determined if they had a problem, back or neck problem, and we treated them.

Q. Could you describe generally what type of patients that you saw at Hamilton Clinic?

A. A lot. The majority?

Q. What type of patient they were.

A. Male.

(6) Q. All right. What was their general complaint or the reason why they were there?

A. Back pain.

Q. And were you also familiar that there was a medical side at Hamilton Clinic?

A. Yes.

Q. What was done on the medical side?

A. Medical procedures.

Q. Medical testing?

A. Yes.

Q. First of all, when you were working at Hamilton Clinic, who were the employees, the medical either doctors or nurses who worked on the chiropractic side of the clinic?

A. Who were the medical doctors?

Q. Yes. Not medical doctors, but chiropractic doctors?

A. It was Dr. Greg Carnill and Dr. Michael Baker.

Q. Was Dr. Demido also there?

A. On occasion.

Q. What was his responsibility as far as you know at the clinic?

A. I don't.

Q. Did you ever see him do anything?

A. Working with the patients.

(7) Q. Well, or otherwise an administrative responsibility?

A. Administrative, yes.

Q. What did he do administratively?

A. Took care of payroll, took care of most of the procedures that had to be done.

Q. What did Michael Bigley do?

A. He was also an examining chiropractic physician.

Q. And Gregory Carnill?

A. He was also a physician. He did examinations.

Q. What kind of physician was he?

A. He was a chiropractor.

Q. Okay. And do you know an individual by the name of Ferris Terrazzi?

A. Yes.

Q. Who is he.

A. He was one of the administrators.

Q. What did he do at the clinic?

A. I don't really know.

Q. Did you ever see him do anything?

A. Yes. He used to consult with the patients.

Q. Did you know whether or not Ferris Terrazzi was paying patients any money?

A. I don't believe so.

(8) Q. Did you ever hear that?

A. I heard that they were doing advertising testimonials and that if they chose to do the testimonial commercial, they could be paid.

Q. Do you know how much they were paid?

A. Let's see, I believe it was thirty when I started. I think it might have went up at one time or another.

Q. When did you leave there?

A. In August.

Q. Could you describe generally what would happen to a patient when they came into Hamilton Clinic; what would happen to them?

A. They first would see me and I would do an examination on them.

Q. Before they saw you, would the information be taken from them?

A. Yes.

Q. Who would take that information?

A. The girls at the front desk.

Q. What kind of information was taken from them?

A. Insurance, if they were insurance or cash paying patients or no-fault, tax and Workmen's Compensation.

Q. Okay. Would there also be a medical type of history (9) taken from them?

A. I believe so, yes.

Q. Did you receive a file when the patient got to see you with certain documents?

A. Yes.

Q. What kind of documents were in the file that you would see?

A. Examination form. That was basically all I had to work with. I really didn't look at much of anything else except my exam form.

Q. Okay. I want to show you what has been marked as Exhibit 1 and ask you if that is the type of file that was maintained at Hamilton Clinic?

A. Yes, it was.

Q. Do you see a form in there with the patient's picture on it and identifying characteristics including their thumbprint?

A. Yes.

Q. And at the back of that form, there is a complaint, for example, back injury of sorts and how it came about.

A. Yes.

Q. That is the type of form that you would receive?

A. Yes.

Q. Okay. What else; describe other documents in that file (10) that you are familiar with?

A. This front page where it says "x-ray diagnostic procedures."

Q. How are you familiar with that form?

A. Well, if I had to take any x-rays of the patient, I would mark what I wanted to be done.

Q. Okay. And what about the rest of the information on that?

A. I didn't have anything to do with that. In the State of Michigan, I am not allowed to do anything but manipulation and spinal x-rays.

Q. Okay. And you are familiar that you only bill for x-rays and emergency treatment?

A. Yes.

Q. Those are chiropractic x-rays, right?

A. Yes.

Q. As opposed to other types of x-rays?

A. That is correct.

Q. And chiropractic x-rays include the x-rays of the spine and the neck?

A. Yes.

Q. Now, do you know how on that order form or the diagnostic procedure form on the front cover, how that got billed out at Hamilton Clinic aside from the x-rays, the chiropractic x-rays?

(11) A. In order for us to have a differential diagnosis to be sure if it is back pain or it is not another problem, a visceral problem referred to the back, we would have to send them to a medical physician in order to get a differential diagnosis because the law tells us that we are not allowed to do that. We can't touch the person with a stethoscope or with a thermometer and we can't look into their eyes and ears.

Q. Okay. Getting back to the general procedure, when the patient would come to see you, what would you do?

A. We would do an orthopedic and neurological chiropractic examination.

Q. What would that consist of?

A. Ranges of motion, reflexes, body stature, weight, if they are carrying more weight to one side than the other.

Q. And you would fill out the chiropractic examination form based upon that?

A. Yes.

Q. Then what would happen?

A. Then if I decided the patient was severe enough to be seen, and I wasn't sure of what the problem really was, I would send them for a consultation.

Q. And a consultation with who?

(12) A. With a medical physician.

Q. Who was that?

A. I believe it was Dr. Asad.

Q. Asad?

A. I believe so.

Q. A-s-a-d?

A. Yes.

Q. Any other medical doctors that were working there while you were working there?

A. There was a Dr. Stanley Rapaport.

Q. And who else?

A. Those are the only two that I can really recall.

Q. Do you remember a Dr. Dean?

A. Yes. Dr. Dean.

Q. Now, before you sent them over for consultation, did you have x-rays performed on the patients?

A. Yes.

Q. And why was that?

A. To determine if there was spinal subluxation.

Q. Okay. And how would you make a determination whether that condition existed?

A. A subluxation?

Q. Yes.

(13) A. By their radiographic study.

Q. Would you have all patients x-rayed, all patients complaining of spinal ailment, would they all be x-rayed?

A. They would, yes.

Q. Why was that?

A. Because I can't see what is going on in their body.

Q. Okay. And what would happen after they were x-rayed and you examined them?

A. I would treat them.

Q. Well, I think you indicated before that you would send them for a consultation with a medical doctor.

A. Yes. If everything came back and the medical doctor said there was nothing wrong with the person or they didn't find anything, then I would treat them.

Q. Okay. Was it the practice of Hamilton Clinic to refer all patients to the medical doctors?

A. I hadn't referred all patients to —

Q. (Interposing) Well, my question is, was it the practice at Hamilton Clinic to refer all patients for medical evaluation?

A. I was never told to. I was never told that I had to. I don't know if it was a practice with the others. I worked the night shift so I was there from three until twelve (14) midnight.

Q. Isn't it true that virtually every patient that came in there with a pain of some sort, back injury, no matter what the source was, was referred to the medical side for testing?

A. Yes.

Q. Now, before you would refer them to the medical side, would you read the x-rays that you took?

A. Yes.

Q. Was it on all occasions that you could not make a determination of what was wrong with that patient based on you x-rays?

A. Sometimes reflexes from visceral organs can cause misalignments of the spine. If you have a liver problem, it can show up to be a problem with your lumbar vertebrae or if you have a pancreatic problem. So what came first, the chicken or the egg? Is it a diseased liver or is it a subluxation causing the disease?

Q. Well, taking a look at the patient file in front of you, what is the patient's name, first of all?

A. Henry Harper.

Q. All right. And Mr. Harper complains of back injury as a result of some accident. Isn't that true?

(15) A. Yes.

Q. And what was the accident?

A. Slipped pushing car.

Q. And he hurt his back?

A. Yes. Neck and low back.

Q. As a result of that, he was given chiropractic x-rays, correct?

A. Yes.

Q. And then on the medical side, he was given additional x-rays?

A. Yes.

Q. And EKG?

A. Yes.

Q. Pulmonary function test?

A. Yes.

Q. Renal ultrasound?

A. Yes.

Q. Blood test?

A. Yes.

Q. Urinalysis?

A. Yes.

Q. Now, after the patient was referred by you or by one of the other chiropractors to the medical side, what was (16) done?

A. Excuse me?

Q. What was done with him after they referred him to the medical side?

A. Afterwards, after they came back to see me the second time or when?

Q. No. After you referred them to the medical side. What happened then?

A. Either they would come back to me or they would go back to the medical.

Q. What happened while they were on the medical side?

A. What happened?

Q. Yes.

A. I guess they had all these tests done.

Q. Well, don't you know that for a fact that they did have all those tests done?

A. According to this, they did, yes. It is written down here.

Q. Didn't you just testify that that is the reason why you are referring them to the medical side in the first place?

A. Yes.

Q. To have tests done to determine all these other things?

A. Correct.

(17) Q. All right. And then what happened after they got through having the tests on the medical side?

A. They would either come back to me or go and see the medical doctor.

Q. Okay. The majority of the patients or almost all the patients would come back to you or one of the other chiropractors, is that correct?

A. Yes.

Q. What would happen after they came back to see you or one of the other chiropractors?

A. They would get treated.

Q. What kind of treatment was given to them?

A. Spinal manipulation.

Q. How did you base the treatment that you gave them; what was the basis for that?

A. Spinal x-rays.

Q. Your chiropractic x-rays?

A. Yes.

Q. Anything else?

A. And results of the medical doctors making sure that there was not a renal problem or a problem elsewhere in the body.

Q. Well, by the time the patient got back to you and you (18) performed the manipulation, would you have the results of all the tests that were performed on the medical side?

A. Sometimes.

Q. Not all the time?

A. Not all the time.

Q. In fact, very seldom would you have all those records, is that correct?

A. That is correct.

Q. And you wouldn't have all the results in any event because you could never get the blood test back from the factory by the time the patient got back to you the same day, is that correct?

A. That is right.

Q. And what would happen after the patient received spinal manipulation?

A. They would leave, schedule another appointment.

Q. Did you ever see a return patient while you were employed there at Hamilton Clinic?

A. Yes.

Q. How many?

A. Oh, I don't know. There were so many patients in every day.

Q. How many patients would you see on a daily basis?

(19) A. Twenty to fifty.

Q. Would you say that there was an equal amount for, let's say, Dr. Carnill that he saw on a daily basis?

A. I don't know.

Q. But there were a lot more patients coming through there than you actually saw, is that correct?

A. I would believe so.

Q. Are you aware that after the patients had their manipulation, they would go see Dr. Terrazzi or one of his associates?

A. Yes.

Q. And that was where they would do their commercials and get paid?

A. I believe so.

Q. Are you familiar with an individual by the name of Johnny Cobb?

A. Excuse me?

Q. Johnny Cobb.

A. No. I don't recall the name.

Q. How about Louis Holly?

A. Yes. I recall that name.

Q. Now, when you went to work for Hamilton Clinic, what were your salary arrangements?

(20) A. I was to be paid weekly.

Q. How much?

A. $600 a week.

Q. For how many hours?

A. Eight to ten hours a day, five days a week.

Q. So forty or fifty hours a week. And how were you paid?

A. Check.

Q. What kind of check?

A. I don't know.

Q. Let me ask you this. Was it a check drawn on a personal or corporate account, or was it in the form of a bank cashier's check or money order?

A. It was a business account.

Q. Business account?

A. I believe so.

Q. Of Hamilton Clinic?

A. Yes.

Q. Now, for the x-rays and other procedures that you performed at the clinic, were you aware that those were billed to Blue Cross and Blue Shield?

A. Yes.
Q. And how were they billed?
A. I don't know.
(21) Q. You did not prepare the billings?
A. No.
Q. Who did?
Q. The administrators.
Q. Okay. Those billings, did you sign them?
A. No.
Q. The claim forms?
A. No.
Q. How were they being executed, then if you didn't sign them?
A. I was just an employee. The boss probably signed them all. I don't know.
Q. Well, they were billed under your provider number, is that correct?
A. I don't believe so.
Q. Some of them were, weren't they?
A. I don't believe so. I was never told. I don't even think I have a provider number. I had one for a day and then it was taken away.
Q. Prior to your going to work or approximate time that you went to work at Hamilton Clinic, isn't it true that you obtained a provider number?
A. Yes.
(22) Q. And you executed an assignment of all the payments on your bills to Dr. Demido or Hamilton Clinic, is that correct?
A. I never did that.
Q. I will show you what I have marked as Exhibit 1 and you can refer to the other documents in there. Do you recognize Exhibit 1 containing your signature?
A. Yes.
Q. And that Exhibit 1 represents an assignment of your claims or payments on your billings to Hamilton Clinic?

A. Yes, it does.

Q. And when was that executed?

A. 3-22-82.

Q. Now, take a look at when your signature was signed.

A. 3-18-82.

Q. And did you sign that?

A. I did.

Q. Assigning all the checks, payments for your services to Hamilton Clinic.

A. Yes.

Q. Does this now refresh your recollection that you did have a provider number and you did make an assignment?

A. Yes.

Q. So your claims would have been put under your provider (23) number, is that correct?

A. I suppose so.

Q. And under your name?

A. I would suppose so. I was never told that that was done.

Q. Well, did you sign the claim form?

A. I never signed the claim form. That is why I didn't think anything was being billed.

Q. You never signed any claim form?

A. Not to my knowledge, I don't remember.

Q. While you were employed at Hamilton Clinic, aside from the spinal manipulations, did you perform any other treatment on patients?

A. Besides the x-rays, no.

Q. The x-rays or tests, not treatment?

A. No.

Q. Did you ever give any patients emergency treatment?

A. What type of emergency treatment?

Q. Emergency first aid for a spinal injury?

A. No.

Q. Dr. Amicarelli, your billing records, and we can obtain billing records for three days in June, June 16, 17, and 18, and you were employed at Hamilton Clinic at that time?

A. Yes.

(24) Q. Okay. Your billing records indicate that on those days you had x-rays administered to at least as far as the billings to ten patients and for seven of those ten patients, you administered emergency first aid for spinal injuries.

A. What type of emergency first aid are you talking about?

Okay.

Q. I am just —

A. (Interposing) I was schooled in New York emergency first aid in New York State, when a patient is in a life threatening situation. Now, an emergency is rendering care immediately for a person to get out of pain.

Q. Well, that is I guess what we are talking about.

A. Okay. I am not talking about somebody who is bleeding to death.

Q. Well, we are talking about emergency first aid for a spinal injury, not for a cut.

A. Emergency first aid for me is putting a cervical collar on a patient who has been in an automobile accident or putting a cervical collar on someone who has gotten into a severe accident or fall.

Q. Is that the type of thing that you billed under emergency first aid to Blue Cross for?

(25) A. I didn't do any of the billings.

Q. Were you aware at that time that whatever you might have been doing was being billed by Hamilton Clinic as emergency first aid to Blue Cross?

A. No. I wasn't aware of that.

Q. Dr. Amicarelli, in your experience with Hamilton Clinic, were you aware that all the patients that came in there — well, let me back up a moment. Most of the patients, if not all of the patients that came in there, you would see files where they would indicate a complaint for some sort of back injury, is that correct?

A. Yes.

Q. Which required at least or as far as you were concerned as far as other chiropractors were concerned there, chiropractic treatment, is that correct?

A. Yes.

Q. And isn't it true that virtually every individual — that it was routine for Hamilton Clinic that every individual who came in there with such a complaint would have a full set of chiropractic x-rays?

A. I don't know if it was routine. I had done it. I don't know if the other doctors did.

Q. Was it your practice for virtually every person who came (26) in there to have a series of chiropractic x-rays performed on the patients?

A. Yes.

Q. Was it a practice that you were aware of, of other chiropractors at the clinic?

A. That they were doing it also?

Q. Yes.

A. I would think so.

Q. Were you also aware it was a practice at Hamilton Clinic that once the chiropractic x-rays were performed that it was the practice of the clinic to send the people to the medical side to be examined?

A. I don't know if it was the practice of the clinic, but the law in Michigan stated that if we had to have a differential diagnosis, we had to send them to a medical personnel.

Q. Well, wasn't it true that it was the practice at Hamilton Clinic that virtually every patient that came

through there was required to go to the medical side to be tested?

A. It is the law in Michigan that we have a differential diagnosis so therefore, I would suppose, yes, everyone would have to go to see a medical doctor in order to get a differential diagnosis.

(27) Q. And isn't it true that virtually every patient that came into Hamilton Clinic with a complaint of some sort of back injury would be sent to the medical side for testing?

A. I would believe so.

Q. Okay. And after those tests were performed, they would be sent back to the chiropractic side is that correct?

A. Yes.

Q. For a manipulation?

A. Yes.

Q. And then after they had the manipulation they would go in and make a commercial?

A. I would suppose so.

Q. Okay. You were aware that they were getting paid for doing those commercials?

A. I would think so.

MR. SOISSON: Do the Grand Jurors have any questions?

A JUROR: In those situations where there was a medical basis for this problem, were they sent back to the chiropractic side, too?

A. No, no. They were either taken care of at the medical facility or admitted to the hospitals.

A JUROR: And what part of the (28) patients that came to the clinic ended up having a medical basis for their problem as opposed to a chiropractic basis?

A. Quite a few. Quite a few. I know ones that I have seen and followed up on because we did see a lot of,

quite a few people, and it was hard do keep track of everyone. But the ones that never showed or showed up for another appointment, I would always try to find out why they didn't and it was a medical problem that took them elsewhere.

A JUROR: In fact, what percent of the patients, more or less?

A. I could probably say twenty percent had medical problems.

A JUROR: And they didn't come back to you?

A. I hadn't seen them. They were treated by the medical personnel.

BY MR. SOISSON:

Q. Well, do you know whether or not they were treated by the medical personnel?

A. Well, I would think so. Things as severe as cancer cannot be let go and go away by themselves.

Q. My question is, do you know whether or not they were (29) provided any treatment by the medical personnel on the medical side?

A. Yes, I do.

Q. And how do you know that?

A. I remember speaking to one of the physician's assistants on a particular patient and this particular person was given some medication for the problem.

Q. He was given a prescription for some problem?

A. I believe so.

Q. And that was one patient?

A. One that I followed up on. Yes.

Q. Okay. Did you know of any other patients that were given any treatment for anything on the medical side?

A. Oh, I am sure there were hundreds but I don't know names or particulars right offhand. I don't want to

deceive you and say, you know, sure, I know a whole bunch of them. I could remember one in particular.

Q. Is it within your personal knowledge of any patients that received treatment aside from the one you have just told us about on the medical side?

A. There were patients that I had seen, had gotten muscle relaxants from the medical side.

Q. And prescriptions?

(30) A. Prescriptions, therapy.

Q. Who gave the therapy on the medical side?

A. I don't know.

Q. So you would have gotten this information from a patient?

A. Yes.

Q. Do you remember the names of any of the patients who were yours?

A. Not right offhand.

Q. Did you keep records of the patients that you saw?

A. No.

Q. Did anybody keep —

A. (Interposing) All records were the property of the clinic. They weren't allowed to be taken out of the facility.

Q. After you left, do you know what happened to the records?

A. No, I don't.

Q. When you saw a patient, would you keep the record of what you were doing?

A. It would be in the file.

Q. In a file such as you have before you?

A. Yes.

MR. SOISSON: Any other questions?

A JUROR: How long did you work for Hamilton Clinic?

(31) A. How long?

A JUROR: Yes.

A. I worked from February, '82 to August, '82.

A JUROR: Do you have any other job besides this?

A. No.

A JUROR: Do you make only $600 a week and fifty hours a week?

A. Yes.

A JUROR: Gross or net?

A. Gross. Things are pretty hard in Detroit.

A JUROR: Could you expand on the law that you stated that is part of the chiropractor's law that you have to get a second opinion or the medical opinion on the situation?

A. Chiropractors in the State of Michigan are not allowed to examine the patient other than the spine. They limit us to the spinal column and that's it. We can't use a stethoscope. We are trained to do everything and anythng a medical doctor could do except write prescriptions and do major surgery. Okay. We can do minor surgery. We know all about it. We have gone to just as much school as the medical physician but the State tells us that this (32) is what you have to do in order to protect — I know in order to protect myself, I am going to get that second opinion because there is a lot of back problems, a lot of neck problems that are not just a spinal problem. They are related to other parts of the body. If we go on treating an injury or we think it is an injury to the neck and a person has had neck and back pain, it could be another problem and I would like to know about it.

A JUROR: There is no specific law that says he has to get a second opinion, though, is there?

A. For a chiropractic?

A JUROR: If I come in and complain of a low back problem and I tell you the injury that caused it and you went ahead and took x-rays.

A. And I didn't find out on the x-rays what the problem was, I wouldn't hesitate to send you to a medical doctor.

A JUROR: But if you did find something on the x-rays, then you would go ahead and treat the case without going to a medical doctor?

A. According to how the injury occurred, yes.

A JUROR: Is there a difference between a straight chiropractor and a chiropractic physician and which are you and what is the difference?

(33) A. I guess I am called a chiropractor and what that means is that I practice medicine besides chiropractic. So most of the doctors that were at the clinic were well versed in medicine as well and that makes the particular chiropractor more cautious. A straight chiropractor is one that stays strictly to the spine and sometimes it doesn't work.

A JUROR: Would you be cautious to the point of ordering tests that a chiropractor would not normally order?

A. I wouldn't order anything. I am not allowed legally to order any tests. It has to be done by a medical physician. The only thing I can do is spinal x-rays and spinal manipulation.

A JUROR: When you did your spinal x-rays, did you have the results from those x-rays in front of you when you sent them off to the medical?

A. It was my choice of when I could have them, okay? We had an automatic processor and I can have the films in ninety seconds. Usually I had because we dealt with a large volume of people. I could never get to the x-rays as fast as I would like. I would be two or three patients (34) behind and looking at the spinal x-rays.

A JUROR: So when you sent them to the medical side, you didn't yet have the results of the spinal x-rays?

A. Sometimes I did. Sometimes I didn't.

A JUROR: Most of the time?

A. Fifty/fifty.

A JUROR: So even though you didn't have the results, you still sent them to the medical doctor in half the cases?

A. You have to realize, most of them just didn't come in with a back pain. They were multiple problems. Sometimes multiple injuries. Some of the injuries weren't even in my realm of domain. One of the injuries, problems that they came in for was like lack of money or they were getting paid in some cases, you know, to come in and be seen, and this, that, and the other. I don't know where you got that idea from because I was only making $600 a week. I would have been a patient myself. You know. If I could get paid to go to the doctor. I don't know where that story ever got started. I heard that and that is totally ridiculous.

(35) A JUROR: Okay.

THE FOREPERSON: You did not recall that your provider number had been used for the billing of treatments?

A. I didn't get a provider number.

THE FOREPERSON: Who is responsible for submitting the provider number for an accounting statement?

A. The administration took care of all of that.

BY MR. SOISSON:

Q. "The administration," being who?

A. They employed about fifty people. By name, I can't recall them all.

Q. Dr. Demido was in charge of the administration, though?

A. He was the boss.

A JUROR: Was this your first place of employment?

A. No, it wasn't.

A JUROR: And you are working now in Orlando?

A. Yes.

A JUROR: And do the other clinics, the places that you work require the same types of (36) Identification, fingerprints, photographs, specifically, license, et cetera, et cetera, that they do of every patient that walks in the door at Hamilton Clinic?

A. Now, having my own business, I can see why he did that. I didn't know at the time why he was doing that. No. But I have gotten stuck with a lot of bad health insurance cards in my office from people coming in for care and the card is no good or the patient isn't the person who the card belongs to. Now, I don't want to break the law, so I call up on every insurance that comes in my office. I ask for identification, a few pieces of ID because if in fact somebody loaned somebody else their health insurance card, that is illegal.

A JUROR: Why did you leave the clinic?

A. It closed down. There is some sort of investigation going on.

A JUROR: Did it seem unusual to you, the number of patients that were treated there daily?

A. No. Not really. The practice I was in before that, we had seen about that amount also.

A JUROR: Where were you employed before that?

(37) A. I was employed in Ettington Chiropractic Center in Staten Island.

A JUROR: Do you have any idea of why the patients found this particular clinic so attractive? Was it the quality of the medicine or the practice or what?

A. They had a hell of a good staff, at least the chiropractors were. All the other clinics around town were pretty busy, too. I guess a lot of people are hurting in Detroit.

MR. SOISSON: Any other questions?

(No further questions were posed by the Grand Jury.)

BY MR. SOISSON:

Q. Dr. Amicarelli, before you leave, I wish to advise you further that the testimony you have just given is under oath and is subject to criminal prosecution if it was false and you knew it to be false. However, if any of the testimony that you have given before this Grand Jury was false and you knew it to be false, you may avoid criminal prosecution for such statements by telling the Grand Jury the truth at this time.

Do you wish to amend or change your testimony in any way?

A. I didn't mean that Detroit is what is hurting.

(38) Q. Your answer is no?

A. No.

MR. SOISSON: Okay. Thank you.

(Gene Amicarelli left the Grand Jury Room.)

A JUROR: I would like to ask another question. Based on the testimony here, at least from my point of view, what is it that you are trying to prove exactly in this case?

MR. SOISSON: You have got to remember that what you are hearing here are selected people. They are not necessarily selected because of their veracity but they are people that we have been unable to contact and interview before. You are going to hear other testimony down the line like, for instance, there was a Dr. Nelson who worked in there for approximately a six-month period on the chiropractic side and I believe that he would testify he was interviewed and indicated that it was nothing more than a mill, that the people were being x-rayed to the depth that they wouldn't have been receiving all these x-rays and should not have had all the testing. He was a chiropractor and felt that what was going on there was entirely unethical and he thought that (39) he was being used simply because the

majority of people that came in there, all of the people that came in there were black, and you know, he was there because he was black and they felt that they could possibly bring more business in.

A JUROR: He was there for six months?

MR. SOISSON: Yes.

A JUROR: Did he say as to what it was unethical he was doing?

MR. SOISSON: He tried to change it when he was there and he confronted Carnill who was the primary chiropractor doing the work there and also Demido on a number of occasions about what was going on. It didn't change so he left.

A JUROR: You said the target per se was Hamilton Clinic. Will specific people be named in the indictment and have others plea bargained?

MR. SOISSON: There has been no plea bargaining?

Demido is one of the primary people. He is in California. Terrazzi and other persons who handed out almost all the money to the people for commercials, I believe, is in California. Rapaport is (40) also in California. I don't have his billings here but he had a very thick printout of billing.

Usman is in — I believe the last we heard, he was in India, and Asad was another of our targets and he is, I believe, still around. And there may be other people.

THE FOREPERSON: He mentioned there were administrators working there when we asked him about the billing. Are there other administrators that we could ask about such as who handed out these referral cards and who was accounting for those type of things?

MR. SOISSON: Yes. People who have been interviewed, most of them got their referral cards from Terrazzi but he is talking about administrators of clerical

personnel that fill out the billings and put in patient information and things like that.

A JUROR: I want to be certain about one thing. I asked this doctor here did he send those patients to the medical side even before he got the results from x-ray of the things, so he maybe sent them just because they just try to generate x-ray income. But he answered, he said that, well, they may have come in for other ailments. Now, what is the fact? Is it the (41) fact they came in for back and they send them to the doctor without even taking a second look or do we have somebody to tell us that one way or the other?

MR. SOISSON: For example, Dr. Nelson will tell you that everybody got the same tests. They were just routine. There were other people at the clinic that have been interviewed. They have indicated it was just routine. Everybody got the same tests. The record can indicate that everybody got the same tests. They were just billed under different doctors' numbers and everybody got the pulmonary function tests, the x-rays, x-rays all over the place, average about fifty x-rays or fifty sheets per patient.

Well, another way we have of showing that is, we sent an undercover agent in there and he went through the regular routine and he had the chiropractic x-rays and the medical x-rays, all the other tests and things like that. He came back to the chiropractic side and they discovered that his initial x-rays didn't show up so they had to re-x-ray him on the chiropractic side.

A JUROR: These people who are coming, do we have a doctor that can say — I mean, you can say fifty seems too much at the beginning. Maybe from a (42) layman's point of view it seems too much. We haven't yet heard of a doctor saying, well, it is to a medical expert, that is too much. Do we have such an expert opinion of that?

MR. SOISSON: Well, we are planning on using Dr. Nelson's statements as far as that is concerned and also there are some people from Blue Cross that can provide us with that information, some laboratory experts and people like that to show what is going on in the industry.

THE FOREPERSON: So there would be an unbiased expert who is not directly involved with the clinic that could perhaps offer some more technical generalizations for us?

MR. SOISSON: Right.

A JUROR: These people who you brought in from this clinic, are guilty of cooperation or there is a conspiracy that they are all telling us — you know, they are all coordinating their testimony because it all sounds very good, at least to me. It doesn't sound that far off the mark. So why did you bring them in?

MR. SOISSON: I think you heard Dr. Dean say that in his opinion they were overutilizing, (43) overtesting and it was nothing more than a mill.

A JUROR: That is true.

A JUROR: Okay. But the last two.

MR. SOISSON: The last two could be considered subjects of the investigation.

A JUROR: I heard no one mention Dr. Nelson's name prior to you mentioning him. Now, has it been mentioned and I just didn't hear it?

MR. SOISSON: I am not real sure of this but I believe that Bigley took Nelson's place when Nelson left and then Amicarelli came in after Bigley got there.

A JUROR: Because Nelson was not there when they started doing the commercials and they started doing the commercials about November of '81.

A JUROR: Can a chiropractor read x-rays?

MR. SOISSON: I don't know. I suppose so. They are supposed to be able to.

A JUROR: This chiropractor said he could do everything.

A JUROR: I wondered if he was also licensed to practice veterinary medicine.

(44) MR. SOISSON: I will have to get out the Michigan statute for you. It is very clear on the scope of a chiropractor's practice. He is very much confined and limited as his training befits, what we might say, it is limited to ailments of the spine, the neck and spine. And it is not supposed to include muscles. Well, it does include muscles but not anything — you know, not supposed to be the liver and the kidney and things like that.

A JUROR: What about the physician's assistants? Will we be hearing anything from them?

MR. SOISSON: We have interviewed one physician's assistant, Stan, who was there for the longest period of time. We haven't decided whether or not he should be made a subject or a target or not yet.

A JUROR: How many times was the ultimate number of times. These last two could be targets?

MR. SOISSON: Definitely.

A JUROR: Who else besides Dr. Usman and Asad and Rapaport?

MR. SOISSON: Just about anybody that worked there for any substantial period of time.

A JUROR: So that these witnesses are (45) questionable?

MR. SOISSON: You have got to keep in mind that one of the bases — you know, it is going to be two bases for our scheme to defraud, our mail fraud scheme. One is that they submitted phony billings, in other words, they submitted phony billings reflecting that the person was being examined and treated for a certain ailment and we would determine that by looking at the billings themselves, like for instance, for the ultrasound

test, they would put on the billings a diagnostic code which supposedly justifies the billing or the tests in the first place and the diagnostic code will show that it is for something that in your wildest imagination you couldn't believe that one of these patients would dream up that they had this thing wrong with them, and the list of diagnoses. We haven't even treated it in the review of the records but it is two and a half pages long already, just from diagnoses of the people that went in there and forty-some patients were interviewed that we have the records for and they indicated that the only reason they were in there is because they wanted to collect their thirty dollars. You know. They may have had a back ache at one time or another but they just wanted to collect (46) their thirty dollars like Johnny Cobb.

A JUROR: Is the question here that they were billing for things not done or is it that they did all these things that they billed for but they weren't necessary?

MR. SOISSON: They weren't necessary.

A JUROR: But these things were done?

MR. SOISSON: As far as we know, they were done, although we can't find any records to substantiate that they were actually done.

A JUROR: All the x-rays and all the other things done.

MR. SOISSON: We don't know where the x-rays are. We don't know where the results of all the other tests, are except for a couple of the Asad things that are contained in the files.

A JUROR: Did this New York thing come up before?

MR. SOISSON: I never heard of it. That is New York's problem.

A JUROR: I don't know. It might have been another one of those mills if he didn't think it was unusual.

(47) MR. SOISSON: I wouldn't doubt it a bit. He might even be operating one in Florida right now.

And for each patient you are going to see, phony patient, each patient is going to have maybe five or six diagnoses as to why they are in there and having all this testing done, you know, because they need different diagnoses to justify a different procedure. They would just use or develop their own diagnoses that would account for whatever testing was being done. I don't know. Maybe some physician can tell me this, but I don't know how much a person who slipped and fell on the ice and activated a minor back injury that causes them a little pain, why that justifies an EKG. You know. I can't see it myself. I don't think that my doctor would do that to me.

Any other questions?

(No questions were posed by the Grand Jury.)
(William Soisson left the Grand Jury Room.)

(Certificate of Reporter Omitted)

GOVERNMENT'S BRIEF IN RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS THE INDICTMENT FOR GRAND JURY IMPROPRIETY

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated February 28, 1985)

(UNITED STATES OF AMERICA, Plaintiff, -vs- JAMES DEMIDO, ET AL., Defendant(s) — CRIMINAL NO. 84CR-20660DT; HONORABLE ANNA DIGGS-TAYLOR)

Defendants have brought a motion requesting that the court dismiss the indictment and have alleged in regards to this that various matters that occurred before the grand jury constituted prosecutorial misconduct.

The defendants claim that when defendants Amicarelli and Bigley appeared before the grand jury they were not advised that they were targets of the investigation and there was further suggestion that they were not advised of their legal rights before testifying. Although not required to do so, it is the policy of the United States Department of Justice to advise witnesses or potential witnesses if they are targets of an investigation. *United States* v. *Mandujano*, 425 U.S. 564 (1976). Contrary to the assertions made by the defendants, said policy was not violated in the instant case because prior to their appearances and testimony before the grand jury neither Amicarelli nor Bigley were considered targets of the investigation. G.J. Tr. 4-5-84, pg. 43. Moreover, a suggestion that neither Bigley nor Amicarelli were advised of their rights before testimony even though there is no constitutional requirement that such rights be given, *United States* v. *Washington*, 431 U.S. 181 (1976), is totally contrary to the record. Tr. 4-5-84, pgs. 2, 3, 4, and 4-4-84, pgs. 2, 3, 4.

The defendants also assert that the prosecutor conducting the grand jury proceedings appeared as a witness before the grand jury and made prejudicial comments. The defendants claim that the prosecutor made inappropriate comments concerning the credibility of witnesses, the businesses of the witnesses, the scope of practice of chiropractors in the State of Michigan. In opposition to these assertions the government states that the record is clear that the prosecuting attorney at no time held his comments out to be those of the witness before the grand jury and that all comments were perfectly proper and not prejudicial under the circumstances.

By its nature, the grand jury proceeding is not an adversary proceeding. Its function is merely to determine that there is probable cause which warrants the defendants being bound over for trial. The defendant has no right to require that the government present all available evidence at the proceeding. The grand jury is a one-sided affair. The defendant is protected from such one-sidedness when at the trial on the merits he has acquired the full protections of the Fifth and Fourteenth Amendments and is permitted to expose all the facts bearing upon guilt or innocence. *United States* v. *Brown*, 574 F.2d 1274 (5th Cir. 1978). *United States* v. *Smith*, 687 F.2d 147 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 752.

Grand juries are for all practical purposes, an investigative prosecutorial arm of the executive branch of government. The authority of the United States Attorney appearing before a grand jury extends to a selection of witnesses who are subpoenaed to appear before, and the prosecutor generally directs the investigation and may do so without consultation with the grand jury. *Smith, id.* at 149. Prosecuting attorney is in control of the grand jury proceedings. In *United States* v. *International Paper Co.*, 457 F.Supp. 571, 576 (S.D. Tex. 1978), the

court characterized the prosecuting attorney as the guiding arm of the grand jury whose responsibility was for the orderly and intelligible presentation of cases. Because the grand jury itself could hardly be considered capable of taking the initiative in the often complex matters arising in federal criminal litigation, it must necessarily rely on the prosecutors to initiate and prepare the criminal cases which come before it. It would be a rare event when the grand jury itself initiates an investigation and obtains subpoenas on its own volition. *Smith, supra,* pgs. 150-151.

Although not required to do so, the prosecutor often times consults with the grand jury and responds to their questions concerning the nature and scope of an investigation. In this consultation it is not inappropriate for the prosecutor to summarize testimony and evidence acquired during an investigation and give an opinion or impression with regard to matters raised by grand jurors. As stated in *United States* v. *Heffington,* 682 F.2d 1075 (5th Cir. 1982), *cert. denied,* 103 S.Ct. 734 at 1080:

> "Furthermore, the conveyance by the prosecutor of his impression as to the guilt or innocence of a defendant does not necessarily and, in this case, did not create a bias. *United States* v. *Cederquist,* 641 F.2d 1047, 1353 (9th Cir. 1981). There is likewise no merit to other challenges by appellants of the alleged inflammatory remarks by the prosecuting Assistant United States Attorney.
>
> Nor do we agree with appellants' assertion that the prosecutor, in his role directing the inquiry, assumed the dual role of a witness and thereby became an unauthorized person under Federal Rule of Criminal Procedure 6(d) when he remained before the grand jury performing his duties as prosecutor. In each of the three epi-

> sodes cited by appellants, the prosecutor was summarizing testimony and evidence already before the grand jury and in one case, leading a witness to respond to a grand jury question. These actions did not propel the prosecutor into the role of witness."

The prosecutor, in performing his function before a grand jury, is free to comment on evidence and the credibility of witnesses and in some case cases is required to do so. *United States* v. *Sears Roebuck and Co.*, 719 F.2d 1386 ( ), *cert. denied*, 104 S.Ct. 1441; *United States* v. *Heffington, supra; United States* v. *Al Mudarris*, 695 F.2d 1183 (9th Cir. 1983), *cert. denied*, 103 S.Ct. 2097; *United States* v. *Martino*, 648 F.2d 367 (5th Cir. 1981), *cert. denied*, 105 S.Ct. 2006.

The prosecutor's responses to questions posed by the grand jurors were perfectly appropriate under the circumstances, particularly as they had to do with the nature of the businesses concerning the witnesses in the scope of chiropractic medicine. The reference to the law of the State of Michigan was simply a reiteration of what Amicarelli had testified to at page 10 of the transcript wherein he stated, "In the State of Michigan I am not allowed to do anything but manipulation and spinal x-rays."

An indictment valid on its face and returned by a legally constituted grand jury is enough to call for a trial on the merits. A defendant is not permitted to a kind of preliminary trial to determine the competency or adequacy of information considered by a grand jury. *Castello* v. *United States*, 350 U.S. 359, 363 (1956). In order for a court to dismiss an indictment there must be a showing of demonstrated prosecutorial misconduct as well as a showing of actual prejudice to the defendant. *United States* v. *Smith*, 687 F.2d 147, 153 (6th Cir. 1982); *United*

States v *Nembhard*, 676 F.2d 193, 199-200 (6th Cir. 1982). Even in a case of the most egregious prosecutorial misconduct before a grand jury, the indictment will be dismissed only upon a showing that the defendant has been unfairly prejudiced. *United States* v. *McKenzie*, 678 F.2d 629 (5th Cir. 1982), *reh. denied*, 685 F.2d 1386, *cert. denied*, 459 U.S. 1038.

In the instant case, the defendants have failed to establish any misconduct or prejudice to any defendant. Nor have the defendants shown the "particularized need" necessary for disclosure of grand jury transcripts. *United States* v. *Smith*, *supra*; *United States* v. *Short*, 671 F.2d 178 (6th Cir. 1982), *cert. denied*, 102 S.Ct. 2939.

Accordingly, the defendants' motions to dismiss and for disclosure of grand jury transcripts must be denied.

Respectfully submitted,

JOEL M. SHERE
United States Attorney
/s/ F. WILLIAM SOISSON (P24766)
Assistant United States Attorney

DATED: 2/28/85

SENTENCING MEMORANDUM

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed October 1, 1985)

(UNITED STATES OF AMERICA, Plaintiff, - v - GENE AMICARELLI, Defendant — Criminal No. 84-20660; HON. ANNA DIGGS TAYLOR)

Defendant, GENE AMICARELLI, entered a plea of guilty to a single Count (Count 153) of the indictment on July 24, 1985. This Honorable Court has received a pre-sentence investigation report prepared by the United States Probation Department. That report provides the Court with personal and financial background information on Dr. Amicarelli. Defendant plans to take issue with a number of items in the report in a separate formal motion. The information regarding the auto body shop at Page 5 is incomplete and misleading. Dr. Amicarelli was the contractual leasee of both the building and the air compressor. Mr. Bartoszewics had defaulted on his contractual obligations. There was a valid and legal repossession. The term "theft" is thus inaccurate and there was no prosecution for this reason. A written explanation with supporting documents is forthcoming. Inexplicably, the author of the report did not inquire of the Defendant or the authorities of the details of this matter. The purpose of this memorandum is to augment that pre-sentence report and to articulate those circumstances which may bear upon extenuation and mitigation for the offense committed.

At the outset, the Defendant submits that the terms of the Rule 11 plea agreement offered by the government in and of themselves support the notion that Dr. Amicarelli was the least culpable individual charged in

the instant indictment. This fact is underscored by virtue of the important stipulation entered into by the government concerning the offense category. In paragraph (D) of the plea agreement, the government agreed that Defendant's culpability should be rated as "category 2" which acknowledges that the amount of fraud in question imputed to Defendant was less than Twenty Thousand ($20,000.) Dollars.

There were a number of other circumstances which strongly militate in favor of the proposition that Defendant was not highly culpable. Dr. Amicarelli did not begin working at Hamilton Clinic until early February, 1982. This was Dr. Amicarelli's first real job as a chiropractor. Moreover, his employment at Hamilton Clinic was also interrupted for a substantial period of time in the spring of 1982, after Dr. Amicarelli had contracted and was diagnosed as having had hepatitis. Consequently, there were several weeks during which Dr. Amicarelli was physically not even at the Hamilton Clinic; yet, ironically he was charged as an aider and abettor in numerous counts where patients were seen, examined, and tested while Dr. Amicarelli was off sick, (Attachment A).

Dr. Amicarelli, unlike other persons, did not profit greatly from the operation of Hamilton Clinic. He received a modest salary in the amount of Six Hundred ($600.) Dollars, per week, which ironically was less than several non-physicians who were employed at the clinic. Dr. Amicarelli received no compensation from Michigan Blue Cross-Blue Shield. He received no monetary award other than the salary.

Defendant respectfully submits to this Court that the picture presented to Dr. Amicarelli at the commencement of his employment was not so clearly illegitimate as counsel for the government suggested to the jury in

his opening statement. The clinic was of substantial size in terms of the number of medical personnel including other medical doctors and a radiologist who were not charged. In pre-trial discussions, counsel for the government suggested that many of these persons were not charged in fact because they were not culpable. Yet, FBI 302's provided in discovery and other information demonstrate that many worked at the clinic for periods of time for as long as Dr. Amicarelli or even longer. These included a radiologist, Dr. Ha, who performed the same function as Dr. Azad. The clinic was also supplied with the best in modern state-of-the-art equipment. As indicated by some of the patient witnesses, the clinic was clean and the staff conducted themselves in a professional manner. For example, Mrs. Rosie Toones, a credible witness, indicated that clinic personnel were professional, courteous, responsive. She didn't feel pushed from one place to another, and felt she was treated with respect. She liked the treatment she received and felt "a lot better."

The nature of much of the patient population as even the government must concede, was a circumstance which fed the impression of legitimacy at Hamilton Clinic. This is so because virtually all of the patients who testified told this Honorable Court and the jury that they were, in fact, hurt, they had pain, and they honestly presented a considerable number of varied symptoms. For example, Mrs. Toones' medical history included severe chills, fatigue, loss of sleep, sweating, dizziness, muscle twitching, high blood pressure, hypertension, breathing problems, severe gas, frequent urination, and a previous history of bladder problems. Mrs. Toones also indicated the history of hypertension and heart attacks in her family. Other patients testified concerning legitimate physical problems. Ms. Rebecca Ballinger testified that on the morning she went to

Hamilton Clinic, she had awoken with a sudden chest pain and difficult breathing. It scared her. Strickland Owens testified that he filled out the medical questionnaires accurately when he included muscle twitch, dizziness, arthritis, poor circulation, diabetes, and numbness in his left leg. Even witness Johnny Cobb whom the government would characterize as a "runner" was steadfast in his testimony concerning his many physical ailments and injuries.

The government's own evidence demonstrated time and time again that Dr. Amicarelli did perform chiropractic examinations. The government's own evidence indicated that time and time again Dr. Amicarelli gave spinal adjustments or manipulation which helped to alleviate or lessen many patients' pain. The government's evidence shows it was Dr. Amicarelli who performed the chiropractic examination on Mrs. Rosie Toones. And Mrs. Toones' testimony showed that exam to be thorough, and professionally administered. Dr. Amicarelli's chiropractic exam was in striking contrast to the spartan exam performed on Special Agent Tisaby by another chiropractor who had a financial interest in the clinic.

The unqualified assertion contained in the Prosecution Version of the pre-sentence report that there was "(E)ssentially no doctor or patient relationship . . . ." is wholly inconsistent with the testimony of the vast majority of patient witnesses. The evidence produced by the government demonstrated the existence of that relationship between Defendant and those patients he examined and gave chiropractic treatments to. For example, witness Pamela May testified that she came to the clinic because she had recently hurt her back and she came with previous knowledge from Henry Ford Hospital that she had scoliosis. Ms. May indicated that she

received a chiropractic examination, had a 15- to 20-minute discussion with the chiropractor who reviewed charts, diagrams and her X-ray with her as well as performing an "angle" test. His discussion gave her some "insight" about her condition and the manipulation "felt good" and helped "to relieve pressure." The chiropractor's diagnosis was consistent with the opinions she had received from other doctors at Henry Ford. The chiropractor was Dr. Amicarelli.

Ms. May's testimony and medical records also demonstrate that many of the generalizations contained in the pre-sentence report are not applicable to all patients. Ms. May, an office worker, unlike many of the plant workers who curiously happened to [*sic*, be] welders, did not receive a pulmonary function test. It was explained that an EKG was necessary because her heart may have been tilted as a result of the scoliosis (curvature of the spine). And she presented symptoms, i.e., intermittent numbness in her fingertips which supported the reasonableness of such a test.

There were other circumstances which contributed to the impression of legitimacy. The clinic had been established and in operation for some period of time. Dr. Demido had lawyers at the clinic. This included a prominent criminal defense attorney who gave assurances to clinic personnel after the FBI raid in February, 1982. Dr. Demido, himself a lawyer, utilized the Michigan law defining the "practice of chiropractic" along with Michigan appellate cases to convince or assure clinic personnel that the medical side of the clinic was necessary. Thus, Dr. Demido relied upon such cases at *Attorney General* v *Benno*, 124 Mich App 342 (1983) which stated in part:

> "While we agree that the information gained from general diagnostic techniques and analysis

> of human specimens may be important to the rendering of chiropractic care, there is nothing in the licensing statute requiring a chiropractor to be trained in evaluating a patient's general physical condition or assessing the health risks involved. For example, a chiropractor is not trained in discerning abnormalities in a patient's heart or lungs, or in interpreting a urinalysis report. If a chiropractor is concerned about the patient's general physical condition, he should refer the patient to a physician trained in such matters." *Attorney General* v *Benno*, supra at 349, 350. See also *Demido* v *Attorney General*, 100 Mich App 254 (1980)

And it should not go unrecalled that the "heavy work" as Johnny Cobb referred to it was that which was performed in the medical building. How is it that a recently graduated and inexperienced chiropractor could challenge the opinions of older and experienced osteopathic physicians or medical doctors.

In what must now seem as a cruel irony to Dr. Amicarelli even the government and Blue Cross-Blue Shield may have helped to foster or fuel the impression of legitimacy by their failure to act with greater dispatch. As Special Agent Tisaby indicated clearly in his testimony, Blue Cross worked closely with the FBI and a Blue Cross undercover investigator was working with Agent Tisaby as early as December, 1981. By the time Special Agent Kite obtained a search warrant in February, 1982, it is apparent from the affidavit that both the FBI and Blue Cross had a firm conclusion that there was unnecessary medical testing at Hamilton Clinic. One is left to speculate why Blue Cross-Blue Shield did not simply stop making payments at that time. They did not. In fact, as the government's

summary chart and the indictment graphicaly show, Blue Cross began combining payments in checks which raised the amounts from a couple hundred dollars per check to thousands of dollars. By continuing to make payments what impression was signaled to clinic employees? Dr. Demido did not share the contents of the search warrant affidavit with Defendant and probably many others. Instead, he represented that the basis of the investigation was an allegation that Blue Cross was being billed for tests which were not being performed. It is apparent that if payments had ceased promptly, Dr. Amicarelli would not be standing before this Honorable Court facing the prospect of imprisonment, fine, loss of his professional license and life-long stigma.

There were other ironies manifest in the government's case. The FBI went to see Johnny Cobb in February, 1982, seeking his assistance as he described it. And, thereafter, patient files acquired later by the government show that Cobb continued to refer people to Hamilton Clinic.

There is no question that many of the tests performed in the medical portion of the clinic were unnecessary and Dr. Amicarelli came to realize it. Yet, given the extensive and varied physical complaints and patient histories provided, it should even be conceded by the government that many tests were medically appropriate. It is doubtless that this is why the government's own medical expert at trial did not provide a specific analysis of individual patient files. A file-by-file analysis given the extensive symptoms provided in the files and given the fact that patient witnesses testified that these were truthful would have only served to show that this question of medical necessity was indeed murky.

Defendant Amicarelli will shortly appear before this Court for sentencing. The mere fact of the instant indict-

ment has placed a severe strain not only upon him individually but also upon his marriage. He has already suffered a great deal both emotionally and financially. The consequences of his conviction yet to follow will be severe. He faces the prospective loss of his license and ability to practice the profession for which he studied and trained for several years. He will have the life-long stigma of being convicted of a felony. That stigma cannot be expunged. It is respectfully submitted that under the totality of all of the circumstances of this case that if this Honorable Court makes an individualized judgment as to Dr. Amicarelli, it may reasonably conclude that incarceration is not necessary. If, however, this Honorable Court should conclude to the contrary, Defendant would respectfully pray that any custodial sentence imposed be less than that of the one (1) year maximum limitation set by the Rule 11 plea agreement or in the alternative that said sentence be imposed pursuant to the provisions of Title 18 United States Code Section 4205(f) or be a split sentence.

Respectfully submitted,

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